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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 646

CARL BIANCHI, L. A. THOMPSON and
WILLIAM POSTER,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioners pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Eighth Circuit, entered in this case on February 10, 1955.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix B, infra, pp. 47-69.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 10, 1955. The jurisdiction of the Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.

Three labor representatives were charged with a conspiracy to obstruct commerce by extortion and the substantive offense of obstructing commerce by extortion in violation of the Hobbs Act, 18 U. S. C. A., § 1951. During the course of a work shutdown, they requested money from an officer of the employer for their own benefit. The evidence disclosed no threats of physical violence to person or property. The officers of the employer consult each other and state that by reason of this request, they were put in fear of economic loss, in fear of injury to their employees and in fear of damage to their equipment. The jury was charged to convict defendants if they caused the work shutdown for the purpose of putting the employer in fear that work would not be resumed unless the money was paid.

The questions presented are:

(1) Whether evidence that an employer paid money to representatives of his employees induced by fear of economic loss was sufficient to prove a conspiracy to obstruct commerce by extortion and the substantive offense of obstruction of commerce by extortion within the meaning of the Hobbs Act, 18 U. S. C. A., § 1951.

(2) Whether in view of the absence of evidence of threats of physical violence to person or property, the trial judge failed to properly instruct the jury by not giving requested instructions distinguishing the Hobbs Act and Section 302 of the Taft-Hartley Act, 29 U. S. C. A.,

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§ 186, which makes it both a misdemeanor for an employer to give and for a labor representative to receive money from an employer.

(3) Whether in view of the absence of evidence of threats of physical violence to person or property, the trial judge is required by Rule 31 (c) of the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under Section 302 of the Taft-Hartley Act, and thus allow the jury to determine whether defendants committed the greater or lesser offense.

(4) Whether in view of the absence of evidence of threats of physical violence to person or property, it was prejudicial error (a) to permit testimony by the officers of the employer that the funds were paid because of fear of injury to employees and of fear of damage to equipment, and (b) to refuse to give a requested instruction advising the jury that there was no evidence of threats of physical violence to person or property.

(5) Whether the trial judge is required to give a requested instruction under Section 6 of the Norris-LaGuardia Act, 29 U. S. C. A., § 106, that the labor representatives were not responsible for the work shutdown in the absence of a finding of clear proof of authorization, participation or ratification after actual knowledge.

(6) Whether the trial court abused its discretion in refusing to grant a change of venue, or in the alternative an indefinite continuance, where prejudicial publicity was created by a report issued by the indicting grand jury on the day of the return of the indictment, by charges of the court to the grand jury and by other statements of governmental officials.

STATUTES AND RULES INVOLVED.

The pertinent statutes and rules are printed in Appendix A, infra, pp. 43-46.

STATEMENT.

Petitioners were convicted in the United States District Court for the Eastern District of Missouri after a jury verdict finding them guilty on two counts of an indictment charging them with violation of 18 U. S. C. A., § 1951. Under Count I petitioners were committed to imprisonment for a period of ten years and under Count II sentence was suspended and they were placed on probation for five years, the term of probation to run consecutively with the term of imprisonment (R. 587-591).

Indictment.

It was charged that petitioners were agents and representatives of various locals of the American Federation of Labor; that petitioner Bianchi was labor representative of the operating engineers, petitioner Thompson was representative of the teamsters and petitioner Poster was representative of the laborers (R. 2). Trojan Construction Company was engaged in taking up an abandoned pipeline in Missouri for the Wunderlich-Aikin Company. Trojan moved its machinery equipment, and employees into Missouri (R. 2). Trojan was also under contract to construct two loop pipelines which were to transport petroleum products across Missouri into another state (R. 1). Petitioners were charged with representing the members of their unions "who were to be employed and were employed" on these projects (R. 2).

Count I charged that petitioners conspired to obstruct, delay and affect commerce and the movement of crude oil, pipeline materials, supplies, equipment, machinery and pipeline employees in commerce by extortion; that in furtherance of the conspiracy petitioners obtained $15,312 from Felix Johnson, as an agent and representative of the Trojan Construction Corporation, property of that company, for their own personal use and profit (1)

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by threatening physical violence to the person of Felix Johnson, and (2) upon the properties of the Trojan Corporation, and (3) by using their respective union capacities in a wrongful, arbitrary, unreasonable and oppressive manner to create industrial strife and unrest on the pipeline projects mentioned by refusing to permit union workmen engaged and to be engaged on the projects, and who were under the respective union jurisdiction of petitioners to begin and continue their work duties until the Trojan Company paid petitioners money (R. 1-3). Count II charged the substantive offense of obstructing commerce by extortion (R. 3-4).

Government Evidence.

The Trojan Construction Company was engaged in taking up the abandoned pipeline, mentioned in the indictment, and approached the vicinity of Dixon, Missouri, when labor difficulty developed (R. 242). Petitioners and other labor representatives met representatives of the Trojan Company at a St. Louis hotel on August 1, 1950. Bianchi complained about the company moving into a territory under the jurisdiction of the St. Louis local unions without consulting the business agents. Felix Johnson, secretary-treasurer of the Trojan Company, replied that he was operating under a national agreement and that he had a conference at Lebanon, Missouri with other union officials. The labor leaders then stated that as long as the Trojan Company worked in their territory it was required to use men from their local unions and that the national agreement meant nothing to them. Thompson further stated that his union, the teamsters, did not have a national agreement and that if the Trojan Construction Company worked his territory his union men would have to drive the trucks (R. 222-223, 259-260, 353, 357-359). The pipeline reclaiming project was stopped during the first week of August after the appearance of

union men from the vicinity of Dixon, Missouri (R. 241-242, 280).

On August 8, 1950 another conference was held between petitioners and Felix Johnson and two other company officials, Crawford and Knapp. Crawford and Knapp left the conference (R. 224, 272, 284). Bianchi, Thompson and Felix Johnson went into the bedroom where they had a private conversation. Bianchi told Johnson that they were not getting anywhere arguing this thing out and that he could fix it so that Johnson could get his job done. Bianchi said that "he can arrange it so that your men can come on through and work all three sections, including the termini territories, for a consideration" (R. 224). The consideration was the payment of three cents per foot for the pipe that Trojan was removing (R. 224). Johnson said that he would have to discuss it with his associates (R. 224).

Testimony of physical violence to person and property consisted of conversations between Trojan officers outside the presence of petitioners. Felix Johnson had a conversation with Crawford, the company vice-president, which he stated had a bearing on his decision to pay money, as he placed complete reliance on his discussion with Crawford. He gave the reason for this reliance as follows, over petitioners' objections: "Mr. Crawford . . . knew the conditions and all, and we considered the possibility of an economic loss or violence on the job and maybe the destruction of some of our equipment" (R. 243-244). He also stated that: "Mr. Crawford and I talked about the balance of the job to be done and how many miles there were, and the possibility of some violence, with a long shutdown which would cost us a lot of money, and possibility of injury to some employees, and maybe some of our equipment would get damaged" (R. 243-244). Crawford in testifying about the same conversation also said: "We talked the matter over, whether to pay off or

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not to pay off and finally the decision was, for reasons of financial loss, to avoid damage to our equipment and employees that we would pay off" (R. 272-273). Felix Johnson also told Albert Johnson, the company president, "that there was a possibility of violence or a long shut-down and loss, or loss of money on the job" (R. 245).

On August 9, Felix Johnson again met with Bianchi and Thompson and advised them that the company did not like the arrangement but that he would pay three cents a foot and would have to have it invoiced. Bianchi suggested an invoice of rental equipment, and said that the job could start at once (R. 224-225). Felix Johnson was permitted to testify as to the reason why he made payments, as follows: "We were in fear, fearful of economic loss and that some of our employees might be injured or some of our corporate equipment might be damaged in some way" (R. 237-238). Felix Johnson also testified that Crawford told him that two union officials, not petitioners, and one "goon gang" from Rolla, Missouri, came out on the line and told him to shut down the job until the labor difficulties could be straightened out (R. 242).

Poster and Bianchi told an equipment rental dealer that the Trojan Company wanted to rent some equipment and that at the conclusion of the rental period they would purchase the equipment (R. 334-335). The Trojan Company made three payments of $3,750.00 to the equipment dealer for equipment rental (R. 232-336), which was never used (R. 225, 270, 297). In the fall of 1950, Bianchi and Poster called on Felix Johnson to inquire about the progress being made in paying the equipment rental (R. 225-226, 230-231). Petitioners organized a company (R. 310, 313) which received a check in the amount of $3,062.50 from the Trojan Construction Company (R. 321) and paid the balance due and owing on the equipment rental to the equipment dealer (R. 325, 340-342). The equipment owned by this

company included the equipment which the equipment dealer had rented to the Trojan Company (R. 330).

The following testimony was admitted only against petitioner Bianchi on Count II (R. 527): Trojan entered an agreement on October 26, 1951, to construct two loop pipe lines paralleling an existing interstate pipe line (R. 267-268). Prior to beginning this project, Felix Johnson held a pre-job conference with labor representatives (R. 226). Afterwards in a private conversation between Bianchi and Johnson, the former brought up the prior job and said that this project "could be started off right" without labor trouble if money were paid (R. 226). Later, after Felix Johnson talked to Albert Johnson, the Trojan Company issued two checks, one payable to Felix and the other to Albert, in the total amount of $1,000 (R. 227). The proceeds of these checks were given to Bianchi in November (R. 228-229). Albert Johnson was allowed to testify, over objection, that the reason why he signed those two Trojan checks was "because I was afraid of potential injury to our employees, destruction of our property and maybe economic loss." When he was asked about his conversation with Felix Johnson he stated that "well, him being a stockholder in the company, he stood to suffer loss and we decided it would be better to pay off then to suffer the consequences that might happen" (R. 200-261).

Petitioners' Evidence.

Trojan had a national pipe line agreement with the laborers and operating engineers (R. 245, 373, 422) which provided that Trojan should pay the weighted average from the beginning of the work to its completion (R. 424, 376), and that Trojan was allowed to keep "specialized men" on all the work throughout the territory of the agreement (R. 375, 423). The teamsters had no national agreement. Representatives of the teamsters and laborers,

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other than petitioners, spoke to a Trojan official about employing local men as teamsters and laborers on the pipe reclaiming project (R. 396, 397, 398, 399, 410). An agreement was not reached so fifteen local teamsters and laborers went out to shut down the Trojan job by talking to their employees and telling them that they were working in the jurisdiction of various local unions (R. 397, 398, 405, 407-408, 410, 412-417). Trojan employees then quit work, although the entire job was not shut down (R. 399). The only demands made were that local citizens be employed and that the union scale be paid (R. 397, 405). None of petitioners were present at the time of the shutdown (R. 405).

Bianchi was asked to attend the August meeting by an international representative of the operating engineers who in turn was contacted by Felix Johnson for the purpose of settling labor difficulty with the engineers (R. 418). At the meeting there was a discussion about operating the job in accordance with the international agreement between the engineers and the pipe line company (R. 418). The international representative complained about the Trojan Company moving to the territory of one local and into the territory of another local in Missouri without talking to union representatives (R. 418), and about the job being non-union (R. 418-419). There was also a dispute as to the proper rate of pay (R. 419-420). It was settled that Trojan would pay what is known as a weighted wage rate for all crafts (R. 419-420, 446). Although the weighted rate for engineers was figured at $2.35 per hour, Felix Johnson refused to go back and pay the weighted rate in the other territories where he had only paid $2.00 per hour (R. 420). One witness stated that when the meeting broke up all differences between the unions and Trojan were not necessarily settled although there was an understanding that they would pay the weighted scale and that the labor situation would be worked out (R. 449). Another witness testi-

fied that it was agreed that the weighted wage rate would only apply to the balance of the job as far as the engineers were concerned and that he assumed that all controversies were settled since the men went back to work (R. 442-443). None of petitioners testified.

Instructions.

The Court instructed the jury that it was the position of the Government that petitioners through their authority as union officers "were able to and would hold up and effect a stoppage of work on the Trojan pipe reclaiming project" and that one of their motives "in causing the stoppage of work was to interfere with interstate commerce" and thereby to obtain money by putting the Trojan officers in fear that the project would not go forward unless the money was paid (R. 513-514). The Court hypothesized certain facts for the jury to find in order to find petitioners guilty. The hypothesization required among other facts that the jury find at the time petitioners made money demands "the pipe reclaiming project had been stopped and no work was being done, and that cessation of work was brought about by defendants in their capacity as union officers." The Court charged that the extortion "was in refusing to permit workmen, members of their unions, to engage in the reclaiming pipe-line projects" until money was paid, that the Trojan officers paid the money in fear that unless it was paid the project would be "delayed by labor trouble instigated and directed" by petitioners, that the petitioners "caused work on the removal of pipe on said projects to be stopped" and that petitioners "caused such stoppage of work to continue until the Trojan Company agreed to pay money" (R. 521-522).

The Court refused to give instructions distinguishing an offense under Section 302 of the Taft-Hartley Act, 29 U. S. C. A., § 186 and a Hobbs Act violation and that peti-

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tioners should not be convicted if only the former act was violated. Requested Instructions Nos. 24, 27-31, 46-47, 49-52, 62 (R. 539-540, 543-544, 544-546, 546, 548). Also refused were requests to allow the jury to convict petitioners of the lesser offense proscribed by the Taft-Hartley Act. Requested Instructions No. 25 and No. 26 (R. 540-542). Overruled was defendants' request that the Court charge the jury under Section 6 of the Norris-LaGuardia Act that no defendant in a labor dispute should be held responsible for the unlawful acts of others except "upon clear proof of actual participation in, or actual authorization of, such acts, or a ratification of such acts after actual knowledge thereof." Requested Instruction No. 14 (R. 538-539). The Court did not give requested instruction telling the jury that there were no evidence of threats of physical violence to person or property as charged in the indictment (R. 555-556) even though the trial court stated there was no evidence of such threats (R. 466).

Motions to Transfer and for a Continuance.

Petitioners each filed three separate motions to transfer the case to another district and each filed three motions for a continuance (R. 30, 32, 34, 35, 39, 43-44), which alleged prejudice because of a report of the Grand Jury and the District Attorney's Office on the "racketeering" investigation, released at the time the indictment was returned on July 23, 1953, and also because of charges of the court to the indicting Grand Jury in April and November, 1953, and the resulting newspaper and radio publicity. The second series of these motions were overruled on February 3, 1954 and the last group on the day of trial, February 15, 1954 (R. 162, 163). On July 23, 1953, the date of this indictment (R. 1), the indicting Grand Jury and the District Attorney's office presented a long report to the Court (R. 108-123) which was given prominence on the front page of the major newspapers in the district. The entire

text was reproduced in the papers (Exhibit 32, at pp. 9-20).[1] It was also blared over radio and television stations (R. 93, 103-105, 106, 107). The report concerned "the activities of the group of labor leaders under investigation" and then detailed the injurious results alleged to have been committed (R. 109).

This report is summarized as follows: The Grand Jury inquiry has disclosed wide-spread violations of the Anti-Racketeering Statute. Large sums of money have been extorted from various contractors by irresponsible labor leaders which have produced the following results: much higher construction costs, delay in completion of projects for military purposes, delay in completion of projects for the general public, refusal of new industries to locate in the St. Louis area, abandonment of plans for expansion by local business concerns, loss of wages to regular union members, forcing of some contractors into bankruptcy, and the refusal of contractors to do any more work in the State of Missouri (R. 109-112). Contractors and the laboring men have been at the absolute mercy of the corrupt labor leaders (R. 212). "Much of the evidence . . . disclosed that labor racketeers carried revolvers with impunity, and on many occasions arranged it so that intended extortion victims, and workers who might complain, were able to see such weapons" (R. 114). "Union meeting rooms are spotted with 'thugs,' friends of the business agents, who immediately silence, by violence or otherwise, any union member dissenting with the views of the union leaders" (R. 116). "Contractors and others feared for their lives at the hands of the racketeers" (R. 117). "The rank and file members of labor unions have sustained loss of wages because of strikes, shutdowns, and the like, fomented by labor leaders, not for the benefit of the

[1] This exhibit, consisting of a scrapbook of newspaper clippings, was not reproduced in the printed record (R. 612).

laboring man, but for the benefit of those leaders themselves solely as a means of the latter to enforce their shakedown demands on contractors" (R. 110). "Many contractors, particularly those from out-of-state, who have been victimized by labor leaders in Missouri, told this Grand Jury that they will not do any more work in this State because of their frightening experience here with labor in the past" (R. 111). The cost of construction in Missouri is higher in Missouri than in other states because of these practices. Contractors feared testifying before the Grand Jury until their businesses "were so seriously threatened that they had no alternative but to disclose the disgraceful situation that existed" (R. 117).

The report concludes as follows:

"In conclusion and again emphasizing the seriousness of the violations brought before this Grand Jury, we point out from the testimony heard by this body the great harm that has been done to the future of Metropolitan St. Louis and other communities in the Eastern District of Missouri.

"Working men have suffered irreparable losses due to the irresponsible leadership of their unions.

"Business men too have suffered losses which can never be regained.

"These losses have resulted in a general financial debility in the area because of decreased purchasing power, both by individuals and businesses.

"Thus workers and businessmen not directly connected with the despicable shakedown racket have suffered, too, simply because they are unfortunate enought to live in a community which permits this racket to operate.

"Even worse, new industry cannot be attracted to a community where there is a possibility that it will be subjected to labor difficulties from the start.

"Firms long-established in St. Louis, no matter how excellent their products, find it increasingly difficult to obtain orders. Their customers are hesitant about buying from companies who may be unable to keep delivery dates because they might be tied up by strikes.

"Worst of all, military orders, so necessary to the defense of this nation and the promotion of freedom throughout the world, have been and can be seriously impaired.

"This is truly a vicious circle—vicious in the strongest meaning of the word.

"While irreparable losses have been suffered by all St. Louis citizens and citizens of the St. Louis area, and great harm has been done to their communities' futures, there is still hope.

"That hope lies in the individual citizen himself" (R. 119).

Prior to the report, in April, 1953, District Judge George H. Moore charged the indicting Grand Jury that "Perhaps the most substantial obstruction to the free flow of commerce concerns reported terroristic activity by professional gangsters and unscrupulous officers and agent of labor organization to extort . . . money . . . from employers, particularly contractors in the construction industry, for their personal enrichment." The court also told the jury that this extortion may take many forms including a payment for labor harmony or failing that threatening physical violence (R. 47). The court stated that the names of witnesses should be kept secret to prevent them from being threatened with physical violence (R. 50). Publicity was given to this charge (R. 75-77).

On November 12, 1953, after a second Grand Jury had been impaneled, Judge Moore gave a renewed charge on "racketeering" (R. 128-131). He expressed disappoint-

ment because no witness had been called before this Grand Jury "to testify in regard to conditions prevailing in the labor racketeering field." He stated that he had requested without success aid from the Department of Justice. He told the jury to request such aid as he felt that their appeal would not be ignored (R. 129) and to inform the court if such request was not forthcoming as vigorous action was especially required to investigate "labor racketeering with it means to life and property and community progress." The court concluded by saying, "The time is here to find out what Government is controlling in this land. Is it the duly constituted government of the United States, or is it an invisible government by lawless men, hoodlums, thugs, racketeers, and gangsters; and prevailing by means of threats, intimidation and violence" (R. 130). Radio and newspaper alike referred to the Court's instructions regarding a renewel of inquiry into labor-racketeering (Exhibit I, pp. 7-11; R. 138-140).[2]

There was other publicity between the period of July 23, 1953, and the date of the trial on February 15, 1954 (Exhibit 5, p. 2; R. 138), including articles and editorials appeared relative to the alleged stalling of the "racket grand jury" for a period of three months and the lack of attention by local officials to this investigation (Exhibit I, pp. 4-5). On November 7, 1953, the newspapers referred to a statement by an Assistant United States Attorney General to the effect that the Department of Justice was investigating numerous complaints about labor racketeering in the area (Exhibit I, p. 6). During the latter part of November and in early December, 1953, publicity was accorded to the renewed grand jury investigation, and the efforts of the grand jury to get further assistance from the Department of Justice in carrying on this inquiry (R.

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144-147). In December, 1953, newspapers reported that Senator Langer and Senator Kefauver planned to come to St. Louis to investigate complaints of a break-down in the government's investigation of labor racketeering attributed to the failure of Attorney General Brownell to provide assistance to the United States Attorney. Both Judge Moore and the foreman of the Grand Jury, it was reported, had requested additional assistance to carry on this inquiry, but this assistance had not been forthcoming (Exhibit I, pp. 17, 18, 19; R. 142-143). On December 5, 1953, newspapers reported that the greatest number of F. B. I. agents ever assigned to labor racketeering here had been put on the job (Exhibit I, p. 29). On December 8, 1953, reports from the United States Attorney in St. Louis indicated that he turned down an offer by the Government that Max Goldschein take charge of the labor racketeering probe. Thereafter the Court objected to the planned hearing by Senators Kefauver and Langer on the ground that it might interfere with the prosecution of pending cases of alleged racketeering. (Exhibit I, p. 24; R. 144-145). Thereafter publicity concerned itself with the revived investigation by the Grand Jury into labor racketeering, with the assurance by the Department of Justice of full aid in the "racket fight" and the appointment of two new lawyers to assist in the Grand Jury investigation.

Reference was made in January, 1954, that the foremen of the two Grand Juries and Judge Moore went to Washington to discuss with the Department of Justice officials the investigation, that thereafter the District Attorney was summoned to Washington, and that Max Goldschein, special Assistant Attorney General, had been assigned to lead and intensify the investigation of local labor racketeering (R. 154-155; Exhibit I, p. 58). Beginning on January 3, 1954, newspapers and radios reported the trial and conviction in the District Court of Paul H. Hulahan

(R. 148-152; Exhibit I, pp. 37-51). After the conviction both St. Louis newspapers presented editorials therein. One stated that "the first of the seventeen labor leaders indicted for racketeering by the federal grand jury has been caught in the federal net," that the testimony "offered other support to the grand jury's statement which described this area as the worst racket mess of the building industry any where in the country" and that both business and home buyer ultimately paid the extortion (R. 148-152; Exhibit I, pp. 37-51). On January 21, 1954, prominence in the press was given to the judge's statement at the sentencing of Hulahan that he was a "hoodlum, a menace to this community," and that "because of hoodlums, such as Hulahan, people in St. Louis are in terror" (R. 155; Exhibit I, p. 61). On January 30, 1954, the text of a statement made by Judge Moore to the Grand Jury, praising them for their investigation into labor racketeering was published. Again on February 1, 1954, an editorial appeared stating in part that racketeering infiltration of honest trade unions "can push construction costs up to prohibitive levels and stifle physical growth of the city" (Exhibit I, p. 55).

The Grand Jury report of July 23, 1953, was mailed to all members of the St. Louis Chamber of Commerce together with a request that the members of the Chamber of Commerce peruse the report "to the end that any illegal conditions in this area may be completely removed" (R. 135). A source used in obtaining names of prospective jurors was the sending of letters to members of the St. Louis Chamber of Commerce asking for employees' names for such jury service (R. 158-162). At the trial none of the jurors professed hearing about this publicity (R. 173, 181). Only one juror stated that he might be biased against petitioners (R. 180, 174, 181, 182-186, 197).

REASONS FOR GRANTING THE WRIT.

The relationship between the Hobbs Act and Section 302 of the Taft-Hartley Act, 29 U. S. C. A., § 186, which makes it an offense both for an employer to pay money to representatives of his employees, and for the representatives of his employees to receive money from the employer, raises important questions of federal law. Labor representatives request money from an officer of employer corporation during negotiations in the course of strike over labor conditions. No threats of physical violence to person or property are made. The officer consults the other officers of the corporation and all agree that they are fearful of economic loss, fearful of physical injury to employees and damage to company equipment. They decide to ignore all grievance procedure and pay the money demands, preferring a payment in lieu of collective bargaining. A wrong has undoubtedly been committed by the labor representative but what is the nature of the wrong, a misdemeanor under § 302 of the Taft-Hartley Act or a major felony under the Hobbs Act? Has the employer or its officers committed a wrong, or do they absolve themselves of all wrong by merely saying that money was paid under duress, fear of economic loss, fear of injury to employees and fear of damage to equipment? Should the jury be instructed as to the difference between the two acts? The Court below says that extortion exists if the employer's fear is through "acquaintance with the general disorder and violence which had accompanied other strikes" even though the defendants are not connected with those strikes or the inducing cause of that fear. A presumption thereby arises that the payment of money by an employer to a representative of his employees is extortion because every employer will be acquainted with "the general disorders and violence" of strikes in general. The holding of the court below has rendered

nugatory the Taft-Hartley provision making it an offense for an employer to pay a labor representative. It has made the mental state of the employer, even though it is not induced by an overt act indicative of extortion, the difference between the two Acts.

1. The Court below found that the case was submitted to the jury under the "fear portion of the extortion statute" and that the theory of the Government was that petitioners created fear by "their wrongful use of industrial strife and its threatened continuation unless pay-off was made." The Court conceded that "there is no proof to support the charges of the indictment that there were threats of physical violence to person or property," but said that the victim's officers testified that by reason of petitioners' conduct they were placed in fear of economic loss, and injury to employees and of damage to equipment. It concluded that this testimony of fear by the officers does not have to be connected with defendants but may originate from "acquaintance with the general disorders and violence which had accompanied other strikes." The Court held that "fear" as used in the extortion section was a broader "fear" than the "fear" used in the robbery section, that the extortion "fear" was fear in its ordinary meaning and included fear of economic loss, while the robbery "fear" was limited to fear of injury to person or property. The Court also said that if fear of damage to property was necessary, the victim's rights under the construction contract may well be considered to be property. Alternatively, the Court said that the testimony of the victim's officers that they were "in fear of economic loss, of injury to employees, and of damage to equipment" proved fear even though it was not induced by, or threat of, physical violence to person or property by any act of petitioners. We assume that the Court also found that petitioners employed a "wrongful" use of fear as that is the standard imposed by the statute.

The result of the decision that fear of economic loss is sufficient draws into the orbit of federal jurisdiction through the Hobbs Act practically all cases of bribery, offenses under the anti-trust law, and even offenses under state law where money is obtained by any fraudulent representations to induce fear of financial loss in the mind of the victim. The Hobbs Act has been made a whirlpool which covers many offenses which Congress could not possibly have had the intention to include. In **United States v. Paramount Pictures,** 334 U. S. 131, 156-159, an anti-trust case, motion picture companies through the device of block booking compelled theatre owners to pay money for pictures which they could not use and did not want because they were afraid of financial loss if they did not do so. The theatre owner parted with his property with his consent because of a fear of financial loss. In other anti-trust cases the victim of the conspiracy is induced to sell his business to a dominant group because of fear of financial loss if he continues to hold it subject to ruinous restraints of trade. He has also parted with his property with his consent because of a fear of financial loss. Similarly numerous cases under the Robinson-Pattman Act disclosed situations where large customers insist on returns of cash discounts or money for advertising allowances illegal under the Robinson-Pattman Act. The manufacturer pays these because he fears financial loss.[3] All such cases now become extortion. Many cases of bribery are cases where bribes are paid because of fear of financial loss. Now, if they involve interstate commerce, they are covered by the Hobbs Act.

The wording of the Act itself shows that "fear" does not mean fear of economic loss. If the word "fear" as used in the extortion definition is not limited by the pre-

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[3] See United States v. Bowman Dairy Co., N. D. Ill., 89 F. Supp. 112.

vious words "force" and "violence" there is nothing in the extortion definition that gives any other kind of limitation and it would include anxiety over any kind of trouble. This violates the settled rule of statutory construction that where a vague word follows more precise terms the rule of ejusdem generis limits the vague term by the precise terms which precede it. If this rule is followed the language of the Hobbs Act must be construed to mean "actual or threatened force or violence or fear of force or violence." The Court's construction of the act makes it read "actual or threatened force or violence or fear of any kind whatever." Such a construction makes the words "force or violence" surplusage because the broader construction of the word "fear" necessarily includes them. It gives the Government a roving commission to prosecute under the Hobbs Act all sorts of heretofore lesser offenses, which could now be penalized to the same extent as a man who got money at the point of a gun.

Moreover the intention of Congress to restrict the application of the Hobbs Act to violence or fear of force and violence is shown by comparing the offenses of robbery and extortion in the act.[4] Robbery requires that property must be taken **against the will** of the victim; extortion requires that it be taken **with his consent.** This follows the traditional distinction between robbery and extortion as defined in state statutes. The robbery section makes it clear that fear must be connected with physical injury to person or property because the words "person" and "property" are expressly mentioned. In the extortion section the words "person" or "property" are omitted.

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[4] A dictum in United States v. Kemble, 3 Cir., 198 F. 2d 889, 890, supports this interpretation:

> "* * * the so-called Hobbs Act makes it a crime against the United States to engage in acts of violence designed to obstruct commerce by extortion."

Under the Court's construction of the Act there is no need to make robbery a distinct offense as extortion is broad enough to encompass any taking. The omission of the words "person" and "property" in the extortion section do not have the effect of extending the Hobbs Act to cover a case of economic coercion in the face of the fact that the word "coercion" during the first draft of the bill was deliberately deleted.

The legislative history of the Hobbs Act indicates that economic coercion was not considered to be one of the means of violating the act. The original bill went into committee with the word "coercion" used as it had been used in the prior act under which convictions were obtained. This bill that went to the committee was practically identical in this respect with the Anti-Racketeering Act of 1934.[5]

The occasion for the introduction of the Hobbs Act was the exemption given to labor from the Anti-Racketeering Act by the case of **United States v. Local 807,** 315 U. S. 521, which held that where union members threatened force or violence in order to obtain unnecessary jobs on trucks, the fact that it was an attempt to gain employment exempted them from the offense of racketeering. The ex-

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[5] H. R. 6872, 77th Cong., 2d Sess., read as follows:

Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, *or coercion,* money or other valuable consideration; protection or protection service, or the expressed or implied promise thereof; or the purchase or rental of property.

(b))
) (Same as 1934 Anti-Racketeering Act.)
(c))

emption did not go so far as to exempt labor officials who threatened strikes to obtain money for their own personal gains. **Nick v. United States,** 8 Cir., 122 F. (2d) 660, and **United States v. Compagna,** 2 Cir., 146 F. (2d) 524. In each of these cases union leaders had been convicted of robbery as defined by the Anti-Racketeering Act on evidence that they had threatened strikes if they were not paid. These cases clearly involved "coercion." Had the bill passed as it was originally introduced, these cases would have governed and fear of economic consequences would have been sufficient to meet the standard laid down by the bill.

The **Nick** and **Compagna** cases were known to every labor leader. They were fighting to eliminate economic pressure as an element of the crime of extortion. Prominent labor leaders, including Mr. Padway, the general counsel of the A. F. of L., appeared before the Committee.[6] Affiliated unions he represented had frequently been guilty of crimes like those in the **Nick** and **Compagna** cases. At the end of the hearings, the bill emerged from the committee with the word "coercion" eliminted (H. R. 7067).[7] By the elimination of the word "coercion" the law as interpreted by the **Nick** and **Compagna** cases was changed. It was clearly not the purpose of Congress to include the giving of bribes to avoid economic coercion by labor within the heavy penalties for robbery and extortion under the Hobbs Act.

Other changes in the Act are most significant. The first provision of the 1934 Anti-Racketeering Act defining the type of interference with trade or commerce makes no mention of force or violence. Section (a) emphasizes physical violence to persons and property. And then Section (b) of

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[6] The hearings were during the second session of the 77th Congress in April and May of 1942.

[7] This bill was reported out of Committee on May 11, 1942. It was eventually passed in 1946.

the Anti-Racketeering Act, which penalizes "wrongful use of force or fear," is changed in Section (b) (1) of the Hobbs Act to "actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." Finally, Section (b) (2) of the Hobbs Act, the provision under which this indictment was brought, uses the words "wrongful use of actual or threatened force, violence or fear," which again emphasizes injury to person or property. We do not think that it is a possible construction tion of this language, particularly in view of the setting in which the changes were made, to read it as the court does as meaning "actual or threatened force, violence or fear of financial loss." Even in the absence of a comparison between the old act and the new one, the addition of these words by judicial interpretation is forbidden by the rule of ejusdem generis.

The debates in Congress bear this out. They show that Congressmen sympathetic to labor were on their guard against making out of economic coercion the crime of extortion. Proponents of the bill explained carefully that this was not so. It was said over and over again that the Act was aimed only at force and violence and it is clear that, had any other interpretation been advanced, the Act probably would not have passed. We quote a typical excerpt from the Congressional debates explaining that force and violence must be proved by the prosecutor as an element of the offense:

> "Mr. Gwynne: . . . Here is what a prosecutor would need to allege and to prove to get conviction under this law if this bill becomes law:
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> "First, they would need to prove that the activity complained of in some way affected interstate commerce; second, they would have to prove that there was an actual, not a theoretical, taking of personal property; third, they would have to prove that the

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taking was by violence, by personal violence, or by actual threats of personal violence, and then, fourth, they would have to prove that the acts done—they might be violent, they might take something, but the Government would have to prove in addition that the acts did not come within the exceptions set out in Title III." 91 Cong. Rec. 11903.

That the word "fear" as used in the Act can only mean fear of force or violence is demonstrated by the following quotations:

Representative Hobbs: ". . . Mr. Chairman, I want to make it perfectly clear that the sole and simple purpose, **the single purpose of this Bill is to do the best we can to protect interstate commerce and free the highways and streets of this country of robbers** . . ." 91 Cong. Rec. 11912.

Representative Whittington: ". . . The bill is to prevent a repetition of the physical violences by members of labor unions on those engaged in interstate commerce. It is to prevent a repetition of the assaults and attacks upon the drivers of trucks with produce entering New York City and similar cases . . ." 91 Cong. Rec. 11913.[8]

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[8] Earlier debates were to the same effect:

Representative Hobbs: ". . . I am talking about what has already happened and the decision of the Supreme Court in the Local 807 case, which the gentleman made reference to, has already decided that no matter how much violence a union man might use in seeking employment, he could not be punished under the 1934 Anti-Racketeering Act. If he commits murder, or if he commits assault with a weapon, it is all right under the anti-racketeering law . . ." 89 Cong. Rec. 3195.

Representative Fellows: ". . . A man with his truck, taking food into the City of New York, is set upon by two or more men, who beat or threaten him with serious bodily harm and thereby compel the payment of a day's wage. It is admitted that in some of these instances these stickup men disappeared

The construction of the Hobbs Act in a case involving payment by an employer to representatives of his employees where there are no threats of physical violence to person or property has to take into consideration the subsequent passage of Section 302 of the Taft-Hartley Act, 29 U. S. C. A., § 186, in the 80th Congress, where a specific section makes all payments to employee representative both an offense on the part of the employer and the representative with certain exceptions. As such payments will normally be motivated by economic consideration, economic loss or gain, the distinction between a misdemeanor and a felony on the representative's part and a crime or no crime on the employer's part should not be based on such an intangible as the employer's state of mind. Especially is this so when his state of mind may be an acquaintance with disorders in past strikes and other factors unconnected with the representative.

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as soon as the money was paid without rendering or offering to render any service. The man pays the money to save himself and his property." 89 Cong. Rec. 3207.

Representative Hancock: ". . . Among the worst offenders have been certain locals of the Teamsters' Union in New York City.

"In that city Local 807 asserted that its members had the sole and exclusive rights to drive trucks of farm produce through the streets of New York to the Washington Market. Farmers driving their own trucks . . . were waylaid on the outskirts of the city and were compelled by physical violence to hire, or, at least, to pay a day's wages to members of Local 807 before they could proceed to market.

". . . According to that (the Local 807 decision), any thug belonging to a teamsters' union may climb on a farmer's truck, beat him over the head with a club and extort a day's pay as a truck driver . . ." 89 Cong. Rec. 3210.

Representative Jennings: "Mr. Chairman, this Bill proposes to correct the condition brought about by the holdings of the Supreme Court of the United States in the case of those convicted for robbery and beating up of farmers and truckers . . . That opinion . . . holds expressly that Congress, by the language used in the Act of 1934, meant to legalize robbery by the use of force, by beating men, by holding them up when they are engaged in interstate commerce." 89 Cong. Rec. 3211.

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During the entire course of the debates of the Taft-Hartley Act Senators reported that the Hobbs Act was not satisfactory and unworkable when it came to matters pertaining to labor situations. In discussing a proposed provision of the labor act to allow injunctive relief to prevent boycotts of perishable goods, it was pointed out that the Hobbs Act made it a felony to interfere with goods traveling along the highways to market. Senator Aiken then said that the Hobbs Act "turned out to be no more than the Petrillo Act, which seemed to be worth nothing at all." 93 Cong. Rec. 4861. Senator Ball stated in regard to the Hobbs Act: "It prohibits only extortion robbery or threats of violence which interfere[s]" and that under Hobbs "it is necessary to prove force or violence or threats, and unfortunately that is not the way the shipments are stopped. It is by means of a secondary boycott, through **economic pressure.** The farmer simply is told O. K. If you do not go along with this, your stuff will not be unloaded when it finally gets to market." 93 Cong. Rec. 4867.

Significantly, Senator Taft, in discussing Section 302, known as the Ball Amendment, stated:

> "The amendment provides first that—It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees.
>
> "That is, it may be said: **In a case of extortion or a case where the union representative is shaking down the employer.** Certain exceptions are made." 93 Cong. Rec. 4746.

Moreover, it would seem that it was the intent of Congress to follow the general rule of statutory construction that where a general statute such as the Hobbs Act is followed by a specific act which covers a particular subject, then the specific statute prevails over the general statute.

Congress in enacting the Taft-Hartley Act has provided a code to cover management-labor relations. Congressional policy was "to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare."[9] To the extent that Congress has prescribed a sanction in that act against employer payments to labor representatives, there is ground for concluding that other criminal penalties have been eliminated. Cf. **United Const. Workers, etc., v. Laburnum Const. Corp.**, 347 U. S. 656, 665.

The Court's conclusion that the payor's right under the construction contract may be considered to be property and that therefore the threat of an illegal strike may constitute damage to property is also a constrained holding. Again the court ignores the limitation imposed on "fear" in the robbery section that the property must be in the custody or possession of the victim or someone in his presence, inferring property in the more tangible sense.

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[9] The policy of the Taft-Hartley Act is set forth at 29 U. S. C. A., § 141 (b):

> "*Industrial strife,* which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.
>
> "It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, *to provide* orderly and peaceful *procedures for preventing the interference by either with the legitimate rights of the other,* to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, *to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare,* and to protect the rights of the public in connection with labor disputes affecting commerce."

The court would, apparently, place no limitations upon the "wrongful use of . . . fear." The alternative holding that since the victim's officers testified that they were placed "in fear of economic loss, of injury to employees, and of damage to equipment" is not sufficient to make a Hobbs Act case. Otherwise, every payment by an employer to his employees' representative is made a Hobbs Act case by the employer's self-interest statement relieving him from sanctions under the Taft-Hartley Act.

2. It is apparent that when an employer pays money to an employee representative the payment may constitute a violation of the Hobbs Act or the Taft-Hartley Act. When there is no threat of physical violence to the person or property the distinction between the two acts becomes slight. The "threat" in the instant case was a statement by one of petitioners that a work stoppage could be fixed if money were paid. Yet under these circumstances the trial judge refused all instructions outlining the difference between a Taft-Hartley offense, bribery and extortion (R. 539-540, 542-544, 544-546, 546-549). These requests were made for the purpose of advising the jury that if money were paid as a bribe, or as a mere violation of 29 U. S. C., § 186, then petitioners should be acquitted of violating the Hobbs Act. The holding of the Court that defendants were not entitled to an instruction distinguishing these two offenses is in apparent conflict with **United States v. Local 807**, 315 U. S. 521, 532, 533, which holds that a defendant is not bound by the conclusions and hearsay statements of the alleged extortion victim insofar as the mental condition of the victim is concerned. The alleged victim in the instant case stated money was paid because he feared economic loss and damage to equipment and injury to employees (R. 237-238). As the jury was at liberty to disregard those statements and conclusions and find that any payment was not the result of fear under the **Local 807**

case an instruction distinguishing the two offenses should have been given.

Two or more employee representatives may conspire together to obtain bribes from an employer. They may intend to receive bribes. Yet if at the time they received the bribe the employer has a fear not based on anything that these representatives did or connected to them but based on the employer's past acquaintanceship with disorders in other strikes the representatives become criminally responsible, under the Court's decision, not for bribery but for extortion. They become responsible for the employer's state of mind even though their overt acts were not acts of extortion. Criminal guilt is personal to the accused. Moreover, the law inquires into a mental state only to determine the quality of some overt act. **American Communication Ass'n v. Douds**, 339 U. S. 382, 437, dissenting opinion of Mr. Justice Jackson. The quality of the overt act in this case should not be based solely on the victim's state of mind testimony. Since the jury is not bound by state of mind testimony, they should have been advised of the existence of the Taft-Hartley offense and allowed to determine from that knowledge whether a Hobbs Act offense occurred. There is great danger in a case involving payments to employees' representatives and no threats of physical violence to person or property, that the jury may assume that since money is paid it was paid under extortion. The charge should be especially clear in pointing out the distinction between these two offenses in a case where there is a fine distinction between them.

The court below concluded that there was no reason to give instructions distinguishing the Anti-Racketeering Act and the Taft-Hartley Act because the trial judge instructed the jury that the mere receipt of money by a labor representative from the employer of his employees was not sufficient to constitute an offense on the indictment. But

that instruction only told the jury that the mere giving of the money was not enough. It was applicable to the payment of money for the supposed equipment rental. The evidence showed that this equipment was held available for Trojan's use (R. 341) and was usable equipment. At most, this instruction told the jury that a true rental of equipment rather than a sham rental would not be sufficient for conviction.[10]

In **People v. Feld**, 262 App. Div. 909, 28 N. Y. S. 2d 796, an attorney for a labor union was prosecuted under the New York extortion act for allegedly extorting money from an employer by threatening to foment a strike among his employees. Defendants contended that the employer, instead of being a victim of extortion, bribed representatives of the labor union and sought to have an instruction to the effect that he should be acquitted if the jury found the employer had committed bribery. The Appellate Court reversed the case because of the refusal of the trial court to give this instruction and because it had instructed that defendant could be found guilty even if the employer paid

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[10] Two illustrations will show that the opinion in the instant case makes distinction between a Hobbs Act violation and a Taft-Hartley violation nebulous or not existent when a labor representative is involved and thereby makes such instructions mandatory:

Employer A pays money to representatives of his employees after they state they can fix the job for him. Employer A states he has no fears. This would be a Taft-Hartley violation by Employer A and the employee representatives.

Employer B states that he paid money to his employee representatives after they told him they could fix the job for him. Employer B also states that at the time he paid money he was fearful of three things, economic loss, damage to his men and damage to his equipment. There is no evidence that the employee representatives are responsible for any acts that induce these fears in Employer B. This could only be extortion by the employee representatives under the holding in the instant case. The employer, moreover, would be absolved of guilt under the Taft-Hartley Act because he acted under "duress."

money as a bribe. The Appellate Court held that bribery and extortion are mutually exclusive. See 11 C. J. S., § 1, at p. 841.[11]

The court below found the strike illegal and considered petitioners' evidence purposeless and an attempt "to convert the trial into a labor dispute hearing." This evidence showed reasons why Felix Johnson, the alleged victim, would have paid money to obtain benefits from the union officials. Trojan signed the national agreement with the laborers and operating engineers which provided that the company should pay the weighted average rate from the beginning of the job to the completion (R. 245, 373, 422, 424, 376). The weighted average meant that the company was required to pay the average of the prevailing wage rates for each territory over which the job extended and that this rate was to be paid for the entire job (R. 419-420). Trojan had not paid the weighted rate and Johnson refused to go back and pay the weighted average rate (R. 420). The agreement also provided that the employees should become members of a union within thirty days (R. 374, 423). Defendant's evidence shows that the job had been non-union (R. 410-411, 418-419, 449). And as far as the teamsters were concerned, although they had no national agreement with Trojan (R. 245, 397, 418), Trojan was paying them less than the prevailing scale and was employing non-union teamsters (R. 397, 416). There was thus reason to pay money so that no back-pay would be due to the workers for their job done from the time Trojan began the job till the project was shut down. Even government counsel argued that petitioners were bribed for the

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11 Prosecutions for tax dereliction offer an analogous situation, for in Spies v. United States, 317 U. S. 492, a conviction for tax evasion was reversed because the trial court failed to give an instruction distinguishing the misdemeanor under § 145 (a) and a felony under 145 (b) of the 1939 Internal Revenue Code.

purpose of increasing the operating schedule of the construction company (R. 492-493). Significantly, the Court below finds that after the pay-offs "none of the defendants made any further demands of the Trojan Construction Company on behalf of their unions for improvement of labor conditions or wages."

The related crime of robbery by fear requires that the fear be induced by some act of the accused and not arise from the mere temperamental timidity of the person whose property is stolen. **Commonwealth v. Novicki**, 324 Mass. 461, 87 N. E. 2d 1. This doctrine together with the traditional requirement of personal guilt, the self interest of the employer in making the case extortion rather than a Taft-Hartley violation, the fact that the petitioners were not bound by the victim's statements concerning his state of mind all seem in fairness to require the jury to consider the distinction between these two offenses in reaching their verdict.

3. Petitioners' requested instruction that the jury might find them guilty of a lesser offense embraced within the charges within the indictment, specifically a misdemeanor under Section 302 of the Taft-Hartley Act, 29 U. S. C. A., § 186 (R. 715-716), was refused. The court below held that petitioners were not entitled to a requested lesser offense instruction which would permit the jury to convict them of a Taft-Hartley violation because the crime of extortion can be committed without committing bribery. The instant indictment charges that petitioners were labor representatives who conspired to receive and did receive payment of money from the Trojan Construction Company by extortion. The distinction between the Hobbs Act and the Taft-Hartley offense is apparently the presence or absence of extortion. **Giles v. United States**, 9 Cir., 144 F. (2d) 860, holds to be necessarily included in the greater offense the lesser

must be such that it is impossible to commit the greater without first having committed the lesser. It may be impossible for a labor representative to violate the Hobbs Act without first having violated the Taft-Hartley Act. The August conversation between Felix Johnson and petitioners was at the very least equivocal. The jury should have been allowed to choose whether or not there was a threat or a mere agreement to accept money from an employee representative in violation of the Taft-Hartley Act. Since the state of mind of the victim is not decisive under **United States v. Local 807**, 315 U. S. 521, the jury should be given the right to choose whether or not a misdemeanor or felony was committed. It would seem that where there is evidence to show either a felony or misdemeanor prosecuting officials should not have the sole choice of deciding the offense of which an accused is guilty, but that an accused should be entitled to a jury verdict on the issue in accordance with Rule 31 of the Federal Rules of Criminal Procedure.

4. Three officials of the construction company were allowed to testify that they feared injury to their employees, destruction of corporate equipment and economic loss on the theory that they could state the reason why money was paid to petitioners (R. 243-244, 245, 237-238, 272-273, 260-261). This testimony injected into the case fear of injury to employees, violence on the job and damage to equipment. This testimony was permitted even though the Court below found there was no threat to support these charges in the indictment. The trial judge also did not give defendant's requested instruction withdrawing the issue of physical violence to person or property from the jury. The court below, relying on **United States v. Compagna**, 2 Cir., 146 F. 2d 524, 529 and **Nick v. United States**, 8 Cir., 122 F. 2d 660, holds that it was not error to allow the various officers of the company to so testify as to these

fears and if there was any error in admitting this testimony "it was without prejudice as it was entirely proper for the jury to infer that the accused expected to play upon such fears." There was no basis except speculation for the jury to infer that petitioners expected to play on fear of physical violence to person and property. Moreover, **Compagna** and **Nick** were cases before the enactment of Section 302 of the Taft-Hartley Act and therefore their conclusions should be reappraised.

The state of mind of the alleged victim is not decisive of the guilt of defendant and should not be decisive as to the admissibility of evidence. The reasons which preclude hearsay evidence are also applicable in limiting testimony relative to the state of mind of the alleged victim. Further, there must be a connection between the victim's state of mind and some act or threat of the accused. Robbery is obtaining property against the will of a victim induced either by the use of violence or fear. The fright to constitute robbery by putting in fear must be under the law an objective fright, as distinguished from a subjective fright. It must be due to some act on the part of the accused and must not arise from the mere temperamental timidity of the person whose property is stolen. See **Commonwealth v. Novicki**, 324 Mass. 461, 87 N. E. 2d 1; **State v. Parker**, 262 Mo. 169, 170 S. W. 1121. Similarly, the fright to constitute extortion by putting in fear must be due to act of the accused. It must be an objective fright and the fright much not arise from the mere temperamental timidity of the person who gives up the property. Guilt of an accused is personal. He is only held responsible for what he does, not for the act of others. Therefore, the state of mind of the payor must be induced by his act.

The law sometimes allows an inquiry into mental state for the purpose of determining guilt. Usually, the only issue in this respect is the mental state of the accused.

However, any inquiry to determine a mental state is only for the purpose of determining the quality of some overt act in question for the purpose of determining the culpability of an act. A person may not incur criminal liability because the Court infers an evil mental state where no act has occurred. **American Communication Association v. Douds,** 339 U. S. 382, 437, dissenting opinion of Mr. Justice Jackson. Similarly, an accused should not incur a more severe penalty because of a mental state which no overt act of his induced. Even **United States v. Compagna,** 2 Cir., 146 F. 2d 524, 528, 529, which holds that a victim should be allowed to show in detail what fear a "threat" of an accused aroused, still states that he should not be permitted to "covertly convey" to the jury an accusation of an earlier and independent crime. This evidence "conveyed covertly" an accusation that petitioners were responsible for threats or acts which induced fear of injury to men and equipment although there was no evidence to warrant such an assumption. Nor was any instruction given as requested to withdraw his testimony from the jury. Thus in this evidence there are suggestions not supported by any evidence that defendants committed acts or made threats which caused such fear.

The effect of this evidence and the failure of the Court to give limiting instructions should also be considered in the light of the grand jury report returned on the date of the indictment (R. 108). That report stated, "much of the evidence before the grand jury disclosed that labor racketeers carried revolvers and with impunity, and on many occasions arranged it so that the intended extortion victims, and workers that might complain, were able to see such weapons." This testimony, considered with this report, carried an extremely prejudicial effect (R. 114).

We are aware of the fact that this Court is not prone to grant certiorari because of a mere evidentiary question.

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But this question raises the fundamental issue as to whether or not the defendant in a criminal case can be given a severe penalty and found guilty of a greater offense where the evidence as to the greater offense consists of testimony of the alleged victim concerning his mental state, which mental state is not induced by any act of accused. Admitting this testimony conflicts with the traditional theory that the courts only inquire into mental state to determine the quality of an overt act. Here, however, the overt act is such as not to have any connection with the mental state. Such an inquiry should not be permitted for the purpose of imposing a greater punishment for another's thoughts not induced by accused. Any penalties which are imposed should be imposed only for a defendant's conduct and not for the beliefs of the alleged victims.

(5) An important question relative to the construction of Section 6 of the Norris-LaGuardia Act should be settled by this Court. The court below finds there was no error in failing to give an instruction on the Norris-LaGuardia Act for the reason that no defendant was charged with responsibility for the act of any officer, member or agent of his union and that such a charge was unnecessary because each of the defendants belonged to a separate union and hence although defendants were co-conspirators no defendant was charged with the responsibility for the act of another officer or member of his union. If two or more defendants were members of the same union the Court may have reached an opposite conclusion.

It is most doubtful whether Section 6 of the Norris-LaGuardia Act would support such a distinction as its scope appears broader than the Court of Appeals recognized. The section refers to responsibility for the acts of members or officers of any "association, organization par-

ticipating or interested in a labor dispute." **United Brotherhood of Carpenters v. United States,** 330 U. S. 395.[12] This broad phraseology cannot limit the protection of the section to the narrow confines of separate craft unions when all of these crafts involved were closely associated both in their activities on the same job and also in the structure of the parent organization, the American Federation of Labor. Unquestionably the local building trade crafts are subject to cross-influences from one another. Under these circumstances the Court of Appeals' distinction is unrealistic and cuts down unjustifiably the benefits of Section 6.

Petitioners were not just held responsible for their own acts which were the statements telling the contractor that the job could be fixed by the payment of money and receiving the benefits of his payments. They were held responsible for the shutdown which the court below called illegal. They did not participate in the shutdown nor did they authorize it. The Government's evidence is that two union officials, not petitioners, contacted Crawford on August 5 and told him to shut down the job until they settled the difficulties with the union (R. 271). One of these officials testified on behalf of defendants and stated that his teamster local union and the laborers union were responsible for the strike (R. 396-397). At the very least it was a jury question whether the request for money was ratification. If the jury found petitioners not responsible for the shutdown, they may have found no extortion as the shutdown is alleged to be the basis of the extortion. Even if a case may be submitted to the jury on the theory that an accused played on his victim's fears, that does not help the government. This was not the theory of the trial judge as he submitted the case to

[12] This case left open the question as to whether Section 6 is a rule of substantive law or of procedure.

the jury on the theory that petitioners **caused** the work stoppage (R. 520-522). The opinion below also states that "the basis upon which the Government claims that fear is created is **defendants' wrongful use of industrial strife** and its threatened continuation unless payoff is made." This statement is a clear recognition that the case below was tried on the theory of responsibility for the work-stoppage. The wrongful use of industrial strife by union members other than petitioners requires a Norris-La-Guardia instruction. Under the theory of the case as submitted by the trial court, petitioners were charged with the responsibility for the work-stoppage. They are charged for the acts of other union officials. The case cannot be tried on one theory and affirmed on another. See **Bollenbach v. United States, 326 U. S. 607.** Moreover, the tenuous line between a Hobbs Act and a Taft-Hartley violation drawn by the Court below would also make such an instruction mandatory.

6. This case conflicts, in principle, with **Delaney v. United States**, 1 Cir., 199 F. 2d 107. The Grand Jury and the District Attorney's office created a prejudicial atmosphere by issuing a report in violation of Rule 6 (e) of the Federal Rules of Criminal Procedure which forbids the disclosure of matters occurring before the grand jury.[13] This prejudice was fanned and kept alive by charges of the court to the grand jury and other publicity emanating in part from the government. It is true that the voir dire examination disclosed bias only on the part of one juror. But the issue is squarely presented as to whether the indicting grand jury and the District Attorney's office can cause a situation presumptively prejudicial and be allowed to take advantage of it. We cannot assume, as the **Delaney** case so clearly states, that the average juror is "so endowed with

[13] Application of United Electrical, Radio and M. Workers, S. D. N. Y., 111 F. Supp. 858.

a sense of detachment so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity."

The report, given wide publicity, concerned itself with sweeping statements about the labor leaders under investigation. They were charged with doing great harm to the entire community; they were charged with interfering with military orders; they were charged with using revolvers to extort money; and they were charged with causing people to fear for their lives (R. 114, 116, 117, 119-120). The community was told that "hope lies in the individual citizen himself" (R. 119-120). This report was circulated not only by the press and radio but by the local Chamber of Commerce, which was a source of prospective jurors. This report obviously had a devastating effect on the population of the district and without question instilled a prejudgment of guilt. It was an attempt on the part of District Attorney's office and the Grand Jury not only to bring charges against petitioners but to insure their convictions.

The only practical means of relief for a defendant when confronted with a prejudicial atmosphere whose depths could not be explored was to apply for a change of venue. The various motions for a transfer offered a convenient means to conduct the trial expeditiously with fairness to the defendants. Moreover, the case could have been tried more conveniently elsewhere because the majority of government witnesses were from residences outside of Missouri. The government should not be allowed to create a climate and then require an accused to be tried in a prejudicial atmosphere of its own making. Rule 21 (a), F. R. Cr. P., provides that the Court shall transfer the proceedings to another district, if satisfied that so great a prejudice exists

against a defendant that he cannot obtain a fair and impartial trial. Although the granting of such an application is within the discretion of the Court, yet the "very enactment of this Rule indicates a belief that circumstances may exist which warrant its invocation." **United States v. Florio**, S. D. N. Y., 13 F. R. D. 296. There as here the publicity was intense and indubitably prejudicial. Nevertheless the Court here repeatedly denied defendants' motions to transfer the proceedings. Nor were these motions ever waived or abandoned by the defendants, for on the very date of trial (R. 206) defendants renewed their motions. Certainly this is a case where the trial court abused its discretion.

This is not an isolated prosecution. The government is presently prosecuting numerous labor representatives either under charges under the Hobbs Act or § 302 of the Taft-Hartley Act.[14] We know of no similar prosecutions involving employers. The relationship of these two Acts is of importance in the administration of that policy. The government itself has appealed to this Court in one case where the trial judge sustained a motion in arrest of judgment.[15] There are other cases pending on appeal not only in the Eighth Circuit but also in the Second and Seventh Circuits.[16] A great many prosecutions are therefore likely to be affected by the ruling here questioned.

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[14] There are over a dozen cases pending in the Eastern District of Missouri alone. Other cases are pending in each district of Illinois, in the Southern District of New York and the District of Columbia.

[15] United States v. Jack Green et al. (S. D. Ill., No. 5236 below).

[16] Callanan et al. v. United States (8 Cir., No. 15139);
United States v. David B. Roche (2 Cir.);
United States v. Evan Dale (7 Cir.).

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

The Act of July 3, 1946, 60 Stat. 420, as amended by the 1948 revision of the Criminal Code, 62 Stat. 862, 18 U. S. C. A., § 1951, the Hobbs Act, provides as follows:

Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

The Hobbs Act superseded the Anti-Racketeering Act of June 18, 1934, 48 Stat. 979, which provided in pertinent part as follows:

Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

Sec. 3. (a) As used in this Act the term "wrongful" means in violation of the criminal laws of the United States or of any State or Territory.

(b) The terms "property," "money," or "valuable considerations" used herein shall not be deemed to include wages paid by a bona-fide employer to a bone-fide employee.

Section 302 of the Act of June 23, 1947, 61 Stat. 136, 29 U. S. C. A., § 186, the Taft-Hartley Act, provides in pertinent part:

Restrictions on payments to employees' representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds:

(a) It shall be unlawful for any employee to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

Section 6 of the Act of March 23, 1932, 47 Stat. 71, 29 U. S. C. A., § 106, the Norris-LaGuardia Act, provides in pertinent part:

Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents.

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Rule 31 (c) of the Federal Rules of Criminal Procedure provides:

The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Rule 21 (a) of the Federal Rules of Criminal Procedure provides:

The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

APPENDIX B.

Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,045.

Carl Bianchi,	Appellant,	Appeal from the United States District Court for the Eastern District of Missouri.
vs.		
United States of America,	Appellee.	

No. 15,046.

L. A. Thompson,	Appellant,	Appeal from the United States District Court for the Eastern District of Missouri.
vs.		
United States of America,	Appellee.	

No. 15,047.

William Poster,	Appellant,	Appeal from the United States District Court for the Eastern District of Missouri.
vs.		
United States of America,	Appellee.	

[February 10, 1955.]

Morris A. Shenker and Sidney M. Glazer (Morris A. Shenker and Mark M. Hennelly, Attorneys for Appellant Bianchi; Harry H. Craig, Attorney for Appellant Thompson; and Philip A. Foley and William Hough, Attorneys for Appellant Poster, were on the brief) for Appellants.

Forrest Boecker, Special Assistant to the United States Attorney (Harry Richards, United States Attorney, and Tom DeWolfe, Special Assistant to the Attorney General, were with him on the brief) for Appellee.

Before Sanborn, Woodrough, and Van Oosterhout, Circuit Judges.

Van Oosterhout, Circuit Judge.

These are appeals by defendants Bianchi, Thompson, and Poster, from conviction on two counts of an indictment and judgments and sentences imposed thereon. The appellants will be referred to herein as defendants, and unless otherwise indicated the defendants shall include the three defendants above namd. The charges were based on section 1951, Title 18, United States Code, which is known as the Hobbs Act and the Anti-Racketeering Act. This statute, so far as material, provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

* * * * * * *

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Count I of the indictment charges defendants with conspiring to obstruct interstate commerce by extortion, and Count II charges the substantive offense of obstructing commerce by extortion. The extortion charged was that the defendants obtained $15,312 for their personal use and profit from the Trojan Construction Company engaged in a project in interstate commerce "by threatening physical violence to the person of the said Felix Johnson and upon the properties of the said 'corporation' and by using their aforesaid respective union capacities in a wrongful, arbitrary, unreasonable and oppressive manner to create industrial strife and unrest on the aforesaid pipe line projects by refusing to permit the union workmen engaged and to be engaged on said pipe line projects and who were under the respective union jurisdiction of the said defendants to begin and continue their work duties, among other things, unless and until the said 'corporation' should pay the defendants the aforesaid money."

The record is voluminous. Some facts are disputed. In determining the sufficiency of the evidence, this court must, upon defendants' appeals, view the evidence in the light most favorable to the Government, and give the Government the benefit of all inferences which can reasonably be

drawn from the evidence. If there is evidence to support the verdict, we are not concerned with the credibility of the witnesses. **Hulahan v. United States,** 8 Cir., 214 F. 2d 441. The facts will be briefly summarized, giving the Government the benefit of the foregoing rule.

The indictment charges and the evidence establishes that Bianchi was labor representative of the Operating Engineers, Poster was labor representative of the Laborers, and Thompson was labor representative of the Teamsters, for the St. Louis area. All defendants met representatives of the Trojan Company at a St. Louis hotel on August 1, 1950, and complained about said company moving into their territory without consulting them as business agents for their respective unions. The company explained that it had a national agreement with the unions, and that its employees had union certification, and that under the national agreement it was permitted to come into the area. Defendants stated that national agreements meant nothing to them, and insisted that local labor be used, Thompson further stating that his union was not a party to the national agreement. Defendants had another meeting with the company officials on August 8, at which time the work on the company's project had been stopped. No progress was being made in the negotiations. Bianchi and Thompson went into the bedroom, and shortly thereafter called in Johnson, Trojan's representative, for a private conference, and stated to him that they were not getting anywhere in settling the labor dispute, and that they would fix it up so that the work could be resumed and the job could be completed for the payment to them of three cents a foot for the pipe that Trojan was removing. Johnson asked time to take this proposition up with his company. The following day Thompson and Bianchi had further talks with Johnson who advised them that the company didn't like the arrangement, but would make the payments demanded. Discussion followed as to the method of payment, and it was agreed

that the payments would be made in the form of rental for fictitious equipment which would be neither furnished nor used. Some time later Bianchi and Poster called on Johnson to inquire about the progress being made in paying the equipment rentals. The equipment rentals were paid as directed by the defendants. The defendants organized a company known as the Washington Equipment and Construction Company of which Poster was president, and Thompson, vice-president. The jury were warranted in finding that the defendants individually derived the benefit of the fictitious rentals. The testimony of the Trojan Company officers would support a conclusion that the pay-off was made because of fear of economic loss, of injury to employees, and of damage to equipment. As to the defendants' testimony, it is summarized by the trial court in its ruling on defendants' motions for acquittal and for a new trial, as follows:

"Neither defendant took the stand in his own defense. Most of the one statement made and the prime effort of the defense presentation was devoted to showing labor relations between certain unions and the Trojan Company. Defendants patently sought to convert the trial into a labor dispute hearing. Because of this failure or refusal of defendants to meet the real issue, we find the matters presented on motion for new trial not plain in their relation to the issues submitted to the jury."

The evidence will be further developed hereinafter.

The defendants' brief sets out in 14 divisions the reasons why they feel this case should be reversed. We have rearranged and consolidated these divisions to some extent. The errors urged, which we will consider in the order listed, are as follows:

1. Overruling of motion for acquittal.

2. Overruling of motions for transfer and continuance.

3. Admission of evidence of fears of officers paying money.

4. Refusal to give requested instructions.

5. Refusal to submit violation of Taft-Hartley Act as included offense.

6. Error in instructions given.

7. Overruling of motions for mistrial and acquittal because of variance between indictment and proof.

8. Errors in limiting defendants' cross-examination and excluding testimony.

9. Invalidity of Anti-Racketeering statute for the reason that the extortion definition is too indefinite.

1. Defendants contend that the threats, if any, do not go beyond putting their victim in fear of financial loss, and that such type of fear is not within the scope of the Anti-Racketeering Act. They insist that for said Act to be applicable fear of physical violence or property damage must be present. The statute here involved is a revision of sections 420a-420e, Title 18, United States Code, 1940 Edition, which was in effect when some of the cases hereinafter referred to were decided. Subdivision (b) of section 420a is as follows:

"Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right * * *."

Thus, the offense now labeled "extortion" was provided for in substantially the same terms in both the present Act and the one it replaced. The former law contained a provision that it did not apply to cases of payment of wages by a bona fide employer to a bona fide employee. The Supreme Court in **United States v. Local 807**, 315 U. S. 521, held that the employment exception was applicable to members of a New York truck drivers' union, whose bona

fide offer of their services to outside truck owners entering the State was rejected and who attempted unsuccessfully by violent means to achieve the status of employees. Congress was dissatisfied with the result of this decision. Hearings were held, later resulting in the enactment found in 60 Stat. 420, which is substantially the same as the present law, 18 U. S. C., § 1951. The legislative changes are reviewed in **United States v. Kemble**, 3 Cir., 198 F. 2d 889, 891. The court said:

"Beyond formal reorganization and improvements in language the principal change accomplished by the new bill was the elimination of the exception the effect of which had been stated in the **Local 807** case. More particularly, the 1946 reenactment covered interference with interstate commerce by actual or attempted 'extortion' and defined 'extortion' as 'the obtaining of property from another, with his consent induced by wrongful use of actual or threatened force * * *.'"

In **Nick v. United States**, 8 Cir., 122 F. 2d 660, Nick, who controlled the motion pictures operators union, made excessive demands for wage increases for his union members. No progress could be made in negotiations for settlement of the dispute until Nick's demand for payment of $6,500 was met, after which a reasonable settlement of the labor dispute was quickly worked out. The only threat Nick made was to have his operators strike and the only fear involved was the fear of economic loss which would be occasioned by such a strike. There is nothing in the opinion to indicate that there was any evidence of threats of physical violence to person or property. The conviction was upheld, the court saying (p. 671):

"The gist of the unlawful act is extortion. Extortion involves a state of mind as an element of an offense under the Act. Unless there is some form of compulsion (either physical or fear) there is no crime under this Act."

In **United States v. Compagna**, 2 Cir., 146 F. 2d 524, which involved a conspiracy to extort money from motion picture producers and exhibitors through threatened strikes unless a pay-off was made, the court expressly states that the victims were not threatened with violence. Nevertheless, the conviction was affirmed. In **Hulahan v. United States**, supra, the factual situation is very similar to the situation here. The victims testified that they were told that if money was paid to defendant their jobs would run smoothly; otherwise, not. The victims' attorney went one step further and stated that in addition to the above the defendant stated that if the money was not paid work that was done might have to be done over because of damages that might occur to the work. This court, after reviewing the evidence, found that defendant's motion for acquittal was properly overruled, stating (p. 444):

"There is no doubt that, under the evidence of the Government, Hulahan was guilty of conspiracy to extort, of attempts to extort, and of actually in two instances extorting, money from the construction companies named in the indictment, by means of express or implied threats of labor trouble. We think that Hulahan was shown to have been doing the very things that Congress in enacting § 1951, Title 18, U. S. C., sought to reach and to make federal offenses, provided interstate commerce was affected."

Fear is not defined or qualified in the extortion definition. In the robbery definition in another section of the Anti-Racketeering Act, "fear" is limited to fear of injury to person or property. Defendants contend that "fear" in the extortion definition should be similarly limited and restricted. Robbery and extortion are distinct offenses. If Congress had intended "fear" in the extortion statute to have a restricted meaning, it could have easily made this clear by so limiting it in the extortion definition or by so defining "fear" whenever the word was used in the statute.

As to this contention of the defendants, the trial court said:

"Defendants argue that extortion by 'fear' is not covered by the Act and that the Act limits extortion to money received only as a result of 'force or violence or a threat thereof.' The meaning of the Act on this point is as plain as the English language could make it. This is not the place to amend or rewrite the Act."

We see no reason why "fear" as used in the extortion statute should not be given its ordinary meaning. It is a simple and well understood word. The present Anti-Racketeering Act and its predecessors have been in force since 1934. As above pointed out. there appears to have been no substantial change made in the definition of extortion. The **Nick** and **Compagna** cases, previously discussed, involved only threats which created fear of economic loss, and are authority against the defendants' contention. Defendants have cited no authority sustaining their position. We conclude that "fear" as defined in the extortion section of the Anti-Racketeering Act should be given its ordinary meaning, and consequently "fear" would include fear of economic loss.

The threat of a prolonged illegal strike would create more fear because of potential economic loss to the victim than the threat of destruction of a few boards or tools. We feel that if fear of damage to property is necessary the victim's rights under its construction contract may well be considered property. The definition of property in the Act is not restricted to any particular type of property. In Webster's New International Dictionary, 2d Edition, "property" has been defined as follows:

"The exclusive right to possess, enjoy, and dispose of a thing; ownership; in a broad sense, any valuable right or interest considered primarily as a source or element of wealth * * *.

"That to which a person has a legal title; thing owned; an estate, whether in lands, goods, money, or intangible rights, such as copyright, patent rights, etc.; anything or those things collectively, in or to which a man has a right protected by law * * *."

See also 73 C. J. S. 142. Even if the definition of fear were to be restricted as contended by defendants, there is evidence that such fear existed. It is true the record contains no direct or positive threat of physical violence or property damage. However, the victim's officers testified that by reason of defendants' conduct they were placed in fear of economic loss, of injury to employees, and of damage to equipment. Under the record such a fear would not be an unreasonable one. The record on continuance and transfer shows wide publicity of terroristic tactics in similar matters. In denying bail the trial court said:

"Defendants have had numerous arrests, some in connection with labor activities. One defendant was convicted in 1931 for 'Breaking and Entering.' The Federal Bureau of Investigation record shows some thirty arrests, many of them for investigation, peace disturbances, interference with lawful employment. We refer to defendant Bianchi. Defendant Thompson was arrested in 1926 on suspicion of robbery; in 1929 convicted for assault to rob, for which he received a three year sentence in the penitentiary. Defendant Poster has been arrested numerous times for affrays and assaults; once for carrying concealed weapons and transporting explosives; once for flourishing a deadly weapon; and once for suspicion of bombing; once for intimidation; a conviction in 1936 for conspiracy and a fine of $500.00; a conviction in 1928 of violation of the liquor laws and a fine of $300.00 * * * "

This evidence was, or course, not before the jury for consideration. However, the following language from the **Compagna** case, supra, at p. 529, has a bearing on the reasonableness of the fears expressed:

"The victims' fears originated from acquaintance with the general disorders and violence which had accompanied other strikes. As such, it was part of what everybody knows, and I cannot see how it could have prejudiced the accused with the jury. Indeed it was entirely proper for the jury to infer that the accused expected to play upon precisely such fears, when Bioff threatened to call strikes." The Anti-Racketeering Act does not curtail legitimate labor activities. Labor has an undoubted right to strike for better wages and working conditions. However, the union members can derive no benefit from their representatives accepting individual payments. This situation is well described in the **Nick** case, supra, at p. 668:

"* * * The Act covers no action by a labor leader honestly acting for the members of his organization. It does cover the compulsory payment of graft to a labor leader for his own individual enrichment. Thus construed, the Act is clearly as protective to labor organizations and their membership as it is to employers. The payment of graft to a labor leader is, clearly, the purchase of his loyalty to his organization. The result is betrayal of his organization. Labor is likely to suffer more through such a sellout than the employer who, willingly or unwillingly, pays the bribe. By punishing the traitorous leader who uses his power for his personal enrichment at the expense of his organization, the Act truly is at least as protective of employees as it is of employers. The Act makes such betrayal hazardous."

It is further contended that the Taft-Hartley Act has modified the Anti-Racketeering Act so as to make the latter Act inapplicable to employee representatives. No authorities are cited to support this contention. The contention is untenable. The offense involved in the Taft-Hartley Act is a voluntary offering of a present or a gift to employee representatives. Under the Anti-Racketeering Act money or

property is demanded under threat of force or fear. The statutes do not cover the same ground.

Defendants also contend that commerce was not obstructed. Briefly, the project here involved the removal of an abandoned pipeline and its shipment out of the State and the installation of loops to an existing interstate pipeline. The material, equipment, and employees moved in interstate commerce. There was ample evidence to support the finding that obstruction of commerce was involved. **Hulahan v. United States**, supra. It is also noted that no exceptions were taken to the instructions submitted to the jury on the commerce phase of the case.

As to the matter of evidence connecting defendants with the crimes charged, the evidence discloses that all defendants participated in the initial conferences. While Poster was not present at the pay-off conferences which were handled by Bianchi and Thompson, he was with Bianchi at the time of the check-up on the payments. He was president of the company receiving the pay-off, and actively participated in the fictitious equipment rentals. He had joined in the negotiations preliminary to the pay-off demand. After the pay-offs, none of the defendants made any further demands of the Trojan Construction Company on behalf of their unions for improvement of labor conditions or wages. There was sufficient evidence to warrant the jury in finding that all defendants knowingly and intentionally participated in the extortion plan. Defendants' motion for acquittal was properly overruled.

2. Defendants each filed three separate motions for transfer to another district and each filed three motions for continuance, all of which were overruled. Prejudice against defendants is claimed because of a report of the Grand Jury and the District Attorney's Office on the racketeering investigation, released at the time the indictments were returned on July 23, 1953, and also on the charges of

Judge Moore to the Grand Jury in April and November, 1953, and many newspaper and radio comments mostly against racketeering in the area in general. The issue of the propriety of these various items is not directly before us. We are concerned with their effect on potential jurors. Rule 21 (a) of the Federal Rules of Criminal Procedure provides for a transfer to another district or division when the court is satisfied that there exists so great a prejudice against the defendant that he can not have a fair and impartial trial in the district where the offense is alleged to have been committed. In **Finnegan v. United States**, 8 Cir., 204 F. 2d 105, this court considered defendant's claim that the failure to sustain his motion for a continuance because of prejudice against him was error. Wide publicity had been given to the charge against Finnegan by newspaper articles, national magazine articles, and proceedings of a congressional committee and the grand jury. In sustaining the denial of a continuance, this court said (p. 110):

"* * * The mere showing that great publicity had been given the matter of the charges against defendant was certainly not sufficient to warrant this court in reversing the case on the ground of the denial of defendant's motion for continuance. * * * Finally, it may be said that newspaper publicity tending to excite public prejudice against a defendant is not usually considered as a sufficient reason for granting an application for continuance. * * *"

The trial judge was familiar with the local situation. He carefully examined the jurors and asked the jurors all questions defendants' counsel submitted. The examination of the jurors did not disclose any prejudice against the defendants. In addition the jury were very carefully instructed by the court to lay aside all extraneous matters and to determine the case solely on the basis of the evidence introduced in the court room. In matters such as this the trial court is wisely vested with a large discretion. Considerable time elapsed between the time of the indict-

ment on July 13, 1953, and the time of trial on February 15, 1954. Under the record here made we can not say that the trial court abused its discretion in overruling the motions for transfer and continuance.

3. Admission of evidence of the fears of officers of the corporation making payment is objected to. Such testimony was admitted solely for the purpose of showing the state of mind on the part of the representatives of the company making payment. As to this evidence the court in its instructions to the jury said:

"I say to you that this testimony was admitted solely for the purpose of showing the state of mind of the party or parties speaking, with reference to why money would be paid, if you find any was paid, as charged in the indictment, and if you find this testimony did show a state of mind, then you can consider it for that purpose only, and for no other purpose in this case. You are not bound by these statements of Felix Johnson in determining his state of mind, but you may consider all the facts and circumstances in determining the state of mind of Felix Johnson at the time he allegedly agreed to pay money as directed, according to the Government's testimony, by defendants Bianchi and Thompson."

This evidence was admissible for the purpose for which it was received. **Nick v. United States**, supra; **Compagna v. United States**, supra. In any event, as stated in the **Compagna** case, if there was error in admitting this testimony, it was without prejudice as it was entirely proper for the jury to infer that the accused expected to play upon such fears.

4. Defendants insist that the court erred in refusing to give requested instruction No. 14 which is based on section 6 of the Norris-LaGuardia Act, section 106, Title 29, United States Code. **United States v. Kemble**, supra, is

authority for defendants' contention that section 6 of said Act applies to the Anti-Racketeering Act. In the **Kemble** case and in **United Brotherhood of Carpenters v. United States**, 330 U. S. 395, the union was indicted solely on the basis of acts of its agents and representatives. In the last cited case the Supreme Court said (p. 403):

"* * * We hold that its purpose and effect was to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration."

If, in the case we are now considering, the unions or the officers thereof, represented by the defendants, were indicted, defendants' cited cases would be direct authority demanding acquittal. Here, however, each defendant belonged to a separate union. No defendant is charged with responsibility for the act of any officer, member, or agent of his union. There was no error in refusing instruction No. 14.

Defendants also complain of refusal to give requested instructions 24, 27-31, 46-52, and 62, concerning differences between the Anti-Racketeering Act and the Taft-Hartley Act and advising the jury not to convict if only the Taft-Hartley Act was violated. The defendants were not on trial for violation of the Taft-Hartley Act. The court gave defendants' requested instruction No. 20 which states in part:

"The mere receipt of money or any other thing of value by a labor representative of employees from the employer of such employees is not of itself sufficient to constitute an offense under this indictment * * *."

Under this instruction the jury were clearly told that defendants could not be convicted for the improper receipt of money alone. This is all that the defendants were entitled to. There was no necessity under the record in this case to instruct in detail as to an offense for which the defendants were not on trial. The court properly refused these instructions.

5. Defendants contend that the violation of section 302 of the Taft-Hartley Act, 29 U. S. C., § 186, should have been submitted as a lesser or included offense. We have heretofore answered this contention in part. The Taft-Hartley Act provision makes it unlawful for an employer to give to his employees' representative any money or thing of value, and likewise makes it unlawful for such representative to receive from the employer any money or thing of value. The following language is included in the requested instructions:

"The difference between this lesser crime and the crimes charged under each count of the indictment is the lack of force, violence and fear and the lack of intent on the part of the defendants to employ force, violence and fear to obtain money or any other thing of value from Felix Johnson."

The Taft-Hartley offense is in the nature of bribery. The offense for which the defendants were tried is extortion. There are substantial differences between these offenses. Some of the differences are pointed out in the foregoing excerpt from the requested instructions. Rule 31 (c) of the Federal Rules of Criminal Procedure provides:

"Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

In **Giles v. United States**, 9 Cir., 144 F. 2d 860, the court said (p. 861):

"To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser."

Manifestly, the crime of extortion can be committed without committing bribery. The trial court was of the opinion that the record would not support a conviction of bribery. The case was not prosecuted on that theory, and the record does not support such a charge. There was no reversible error in refusing to submit the violation of the Taft-Hartley Act as an included offense.

6. Defendants urge error in some of the instructions given. They contend that it was error to include in the charge the hypothesis that there was a cessation of work brought about by the defendants for the reason that there was no evidence to support it. We believe there was evidence from which the jury could infer that defendants had a part in the work stoppage. At their request defendants entered into labor negotiations with Trojan officials. Defendants advised such officials that upon pay-off work could proceed without difficulty. After the pay-off it did so proceed. There is also Aikin's evidence that defendants told him they were going to shut him down and he had better see Johnson.

Defendants complain that under the instructions given the jury could find defendants guilty if they obtained money under color of office as union representatives. Defendants are referring to the common law offense of extortion where, in case of public officers, color of office takes the place of force, threats, and pressure. No one contends that defendants are liable merely because they are union officials, and obtained the money. As to this contention the trial court in ruling on motion for a new trial said:

"The only time such terms have come into this case they were injected by the defendants. They appear once in the charge and then at defendants' request and in a negative way. Defendants requested and the Court gave their request number 54. It reads:

" 'If a Union officer accepts money or property as a private individual and not in his official capacity there can be no finding of extortion under color of office however inconsistent with official duty may be the acceptance of such money or property.' "

The defendants are not in a position to object to an instruction given at their request.

Defendants likewise claim error in the portion of the instruction advising the jury, "A person is presumed to intend the natural and reasonable consequence of his own act." The foregoing excerpt is but a small portion of a lengthy instruction on intent. **Morissette v. United States,** 342 U. S. 246, cited by defendants, holds that criminal intent is an essential element of the crime of larceny there charged, and that the issue of intent should have been submitted to the jury and not peremptorily decided by the court. In the case which we are now considering, intent was dealt with at length in the instructions, and the court advised the jury that they must find criminal intent in order to convict. A portion of the instruction on intent reads as follows:

"* * * What I now desire to call your attention to is that it is necessary, before you find the defendants, or either of them, guilty, as charged under count 1, that you find the defendants became parties to the conspiracy charged intentionally and with the knowledge of the purposes of such conspiracy and for the purpose of furthering its aims and objects. When I say intentionally and knowingly, I

mean that they became such parties with bad purposes, without justifiable excuse. I say to you that the defendants must be shown to have had grounds for believing and did believe the purposes of the conspiracy were unlawful and that the purposes of the conspiracy would affect interstate commerce, as charged in the first count of indictment. * * *"

We have approved language similar to that here objected to. **Bentall v. United States,** 8 Cir., 262 Fed. 744; **Blumenthal v. United States,** 8 Cir., 88 F. 2d 522.

The point is likewise made that the court erred in not withdrawing the issue of physical violence to person or property from the jury. It is true, as contended by defendants, that there is no proof of use of violence to person or property or any positive proof of actual threats of such violence. A careful reading of the instructions discloses that the case was not submitted to the jury on charges of actual or threatened force or violence, but was submitted on the fear portion of the extortion statute. The following excerpt illustrates the type of extortion submitted:

"But it is claimed by the Government that the motive behind the conditions laid down by the defendants for agreeing for the men to resume work was to extort from the Trojan Construction Company, under the compulsion of threats of labor trouble on their jobs and stoppage of work, the payments of moneys to the defendants personally, and that this money was paid by the Trojan Construction Company under fear that the work would not otherwise proceed; in other words, extortion."

The instructions given are lengthy. Defendants requested at least 63 instructions. Neither the instructions nor the requests can be set out at length without unduly extending this opinion. All exceptions to the instructions have been considered, as well as the instructions as a whole. We find

no merit in the objections urged by the defendants to the court's instructions.

7. Defendants contend that the court erred in overruling their motions for a mistrial and acquittal because of substantial and prejudicial variance between the indictment and proof. It is conceded that there is no proof to support the charges of the indictment that there were threats of physical violence to person and property. However, in addition, the indictment fairly charges extortion contrary to section 1951, Title 18, United States Code. This statute by its extortion definition makes it unlawful to obtain money or property by the wrongful use of fear. The basis upon which the Government claims the fear is created is defendants' wrongful use of industrial strife and its threatened continuation unless pay-off is made. In **Crain v. United States**, 162 U. S. 625, 636, the Court said:

"* * * We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. * * *"

To the same effect, see also **Price v. United States**, 5 Cir., 150 F. 2d 283, 285; **Ackley v. United States**, 8 Cir., 200 Fed. 217, 221; **Mellor v. United States**, 8 Cir., 160 F. 2d 757, 761. **Berger v. United States**, 295 U. S. 78, 82, cited by the defendants, affords them no relief. The test there prescribed is:

"The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered

at the trial; and (2) that he may be protected against another prosecution for the same offense."

The indictment in this case sufficiently advised the defendants of the charge upon which they have been convicted.

8. Defendants urge error in limiting their cross-examination of certain witnesses and in sustaining the Government's objections to certain testimony. The errors urged are very general, and are not supported by convincing applicable authority. Many of the objections may be disposed of by applying the general rule to the effect that the extent of the cross-examination rests largely in the sound discretion of the trial court. **Holmes v. United States**, 8 Cir., 134 F. 2d 125; **Myres v. United States**, 8 Cir., 174 F. 2d 329.

In some instances the testimony was properly excluded because it was beyond the scope of the direct examination, and there are other valid reasons stated in some of the objections which warranted the ruling made. Defendants have not set out in their brief their numerous objections in detail. Error is claimed in restricting the defendants' cross-examination of Felix Johnson about whether or not he was paying the prevailing wage and whether the national contract provided there should be no work stoppages. The defendants were permitted to introduce the national agreement and to show the prevailing wage scale and the wages Trojan paid through their own witnesses. Error is further claimed in refusing to permit cross-examination of Albert Johnson as to whether or not he liked to have his company unionized, and in refusing defendants the right to go into detail as to rentals received from Trojan by the witness Knapp. A further complaint is that the court refused to permit cross-examination of Felix Johnson as to whether he was invited at a contractors' meeting to make complaints about any conduct of labor representatives, and to admit testimony of defendants'

witnesses on this subject. The international agreement is in evidence, and said agreement provides that there shall be no strikes, and that violation should be reported to the international union.

The Government's witness Aikin, on cross-examination, denied that he had offered a bribe to one Cline, a witness for defendants. The court sustained the Government's objection to defendants' offer to prove by Cline that Aikin had offered him a bribe. Defendants claim this evidence to be admissible to show interest, bias and prejudice on the part of the witness and to show that Aikin violated the Taft-Hartley Act. Cline was not a defendant and Aikin was not a victim of defendants' acts here involved. This evidence was properly excluded on the basis that a witness can not be impeached on a collateral matter by extrinsic evidence. See **Cwach v. United States**, 8 Cir., 212 F. 2d 520, 530. The court did not commit any prejudicial error in its rulings restricting cross examination by defendants and in excluding the evidence hereinabove referred to.

9. Finally, defendants urge error in the overruling of defendants' motion to dismiss based on the invalidity of the statute, in that the word "wrongful" in the extortion definition is too vague and too indefinite to provide an actionable standard of guilt and therefore violates the due process clause of the Fifth Amendment. "Wrongful" is defined in the original Anti-Racketeering statute as the violation of the criminal laws of the United States or of any State or Territory. Judge Biggs, in his dissenting opinion in **United States v. Kemble**, supra, at p. 902, states that "wrongful" is not a term of strong art in the criminal law. He quotes various definitions and recites the legislative history of the Act, and reaches the conclusion that Congress by the use of the word "wrongful" intended a public wrong or crime as distinguished from a private wrong. The majority opinion in the case held that the

Act was intended to cover forced payment of wages in a proper case, and that the case there being considered was a proper case.

We do not believe that Congress by omitting the definition of "wrongful" in the present Act intended to change the meaning of the word as defined in previous acts. So construed, the definition of extortion in the present statute is substantially the same as it was in the former statute. The constitutionality of the earlier statute was fully considered and upheld by this court in **Nick v. United States,** supra. See also **United States v. Compagna,** supra. The statute upon which the indictment is based does not violate the due process clause contained in the Fifth Amendment to the Constitution.

A careful consideration of all of the errors urged by defendants leads us to the conclusion that no reversible error has been shown. The defendants have had a fair trial. The judgments and sentences are affirmed.

A true copy.

Attest:

E. E. Koch,
Clerk, U. S. Court of Appeals, Eighth Circuit.

(Seal)

Judgments.

UNITED STATES COURT OF APPEALS
for the
Eighth Circuit.

No. 15045 . . . September Term, 1954.

Thursday, February 10, 1955.

Carl Bianchi,

Appellant.

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Carl Bianchi, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

February 10, 1955.

UNITED STATES COURT OF APPEALS
for the
Eighth Circuit.

No. 15046 . . . September Term, 1954.

Thursday, February 10, 1055.

L. A. Thompson,

Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, L. A. Thompson, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

February 10, 1955.

UNITED STATES COURT OF APPEALS
for the
Eighth Circuit.

No. 15047 . . . September Term, 1954.

Thursday, February 10, 1955.

William Poster,

Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, William Poster, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of filing of the mandate of this Court in the said District Court.

February 10, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 646

CARL BIANCHI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 47-69) is not yet reported.

JURISDICTION

The judgments of the court of appeals (Pet. 70-72) were entered on February 10, 1955. The petition for a writ of certiorari was filed on March 9, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is extortion within the meaning of the Hobbs Act, 18 U.S.C. 1951, for a labor union representative to obtain money for his own benefit from one who is induced to pay it by fear of economic injury.

2. Whether, in a prosecution under the Hobbs Act, it was error for the court to refuse a charge based on Section 302 of the Labor Management Relations Act of 1947, making wilful payments by employers to representatives of employees a misdemeanor.

3. Whether it was proper to admit testimony by the persons from whom money had been extorted as to the fears that motivated the payment.

4. Whether Section 6 of the Norris-LaGuardia Act applies to criminal prosecutions against union representatives who are charged as individuals with extortion under the Hobbs Act.

5. Whether the trial court abused its discretion in refusing to grant either a change of venue or an indefinite continuance because of alleged local prejudice.

STATUTE INVOLVED

18 U.S.C. 1951 provides in part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in

furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Pertinent provisions of the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. 151 *et seq.*) and the Norris-LaGuardia Act (47 Stat. 71, 29 U.S.C. 106) are set forth in the Argument, *infra*, pp. 15, 20.

STATEMENT

In the United States District Court for the Eastern District of Missouri, a jury found petitioners guilty on the first two counts of a three-count indictment charging violations of 18 U.S.C. 1951 (R. 1-6). Count 1 charged a conspiracy to obstruct,

delay, and affect interstate commerce by extortion, and Count 2 the substantive offense of obstructing, delaying, and affecting interstate commerce by extortion. Each of the petitioners was sentenced to 10 years' imprisonment on Count 1; on Count 2 imposition of sentence was suspended and petitioners were placed on probation for a period of five years to run consecutively with the term of imprisonment (R. 587-591). On appeal, the judgment was unanimously affirmed (Pet. 69).

The evidence for the government may be summarized as follows:

At all times involved, petitioners were representatives of labor unions in the St. Louis area—Bianchi for the Operating Engineers, Poster for the Laborers (R. 258), and Thompson for the Teamsters (R. 408).

The Trojan Construction Company, a corporation engaged in general pipe line construction with principal offices in Oklahoma City, Oklahoma (R. 221), entered into a contract in June 1950, to reclaim pipe from an abandoned oil pipe line in St. Louis County (R. 221, 302, 303, 352; Gov. Ex. 26). The reclaimed pipe was subsequently reconditioned and shipped out of Missouri (S.R. 6; Gov. Ex. 27). Work on the contract was completed in November 1950 (R. 221). Late in July 1950, in advancing along the pipe line right of way, the Trojan work crews came within the geographic jurisdiction claimed by the St. Louis locals (R. 221).

In November 1951, the Trojan Company, pursuant to a contract with a subsidiary of the Phillips Petroleum Company, began constructing in the State of Missouri two loops of pipe, of about 40 miles, to be tied into a main pipe line used for transporting refined petroleum products from Border, Texas to East Chicago, Indiana (R. 266, 268). Since the compensation to Trojan was based on a specific cost per linear foot, every day that the Trojan employees could work was beneficial to the construction company, while every day that Trojan employees could not work would cost the company fifty percent (50%) of what an operating day would cost (R. 258, 259).

On both contracts, Trojan used equipment brought into Missouri from out of the state (R. 270; S.R. 91-105). It employed members of three different craft unions, *viz.*, laborers, teamsters, and operating engineers (R. 222), some of whom had been hired in Oklahoma (R. 287, 294, 296).

Around August 1, 1950, petitioners met the president and secretary of the Trojan Construction Company at a St. Louis hotel (R. 222). They demanded to know what the company meant by coming into the area without making a deal with them (R. 259, 260). When Felix Johnson, the secretary of Trojan, said that the company was operating under national agreements with the craft unions employed and would make arrangements with petitioners in accordance with the national agreement, petitioner Bianchi stated, "Well, if you are going to work in this territory, you are going to work our way, because we do not believe in the national

agreement." (R. 259-260.) Petitioners demanded that Trojan employ men associated with the St. Louis locals as long as it worked in the St. Louis area (R. 222,223).

Shortly after August 1, 1950, petitioners met with a partner in the company which had engaged Trojan to reclaim pipe line for it and said that they were going to shut down the job (R. 353). Referring to Trojan as "the Johnson boys," petitioner Bianchi said, "The Johnson boys are shut down. You better see the Johnson boys." (R. 353). On August 5, and 6, the vice president of Trojan reported to other officers of the company that union representatives (not petitioners) had told him they "had better shut our job down until we were straight with the union " (R. 271) and that "goon gangs" had run a foreman and welder off the right of way and told them there would be trouble if the job was not shut down (R. 272). All work on the pipe reclaiming project ceased on August 5, 1950 (R. 242).

On August 8, 1950, representatives of Trojan met with petitioners and other union representatives at the Statler Hotel in St. Louis (R. 223). During the meeting, Bianchi motioned for Felix Johnson, one of the company's representatives, to come with him and Thompson into the bedroom of the suite. Bianchi said they were not getting anywhere arguing about the matter and that he could "fix" the situation so that Trojan could get the job done. When Johnson asked what he meant, Bianchi said, "Well, we can arrange it so that

your men can come on through and work all three sections, including the termini territories, for a consideration." When Johnson asked Bianchi what he meant by a "consideration," Bianchi said it would cost 3 cents per foot of pipe taken out of the ground on the reclaiming project. Johnson remarked that this was a lot of money as it amounted to $150 per mile and there were approximately 90 miles of reclaiming work on the project, that he would have to talk it over with his associates. When Bianchi, Thompson, and Johnson returned to the living room of the suite, Bianchi told his associates that he thought he could get the matter settled if they would leave. They left. (R. 224.)

On August 9, 1950, Bianchi and Thompson came to Johnson's suite in the Statler Hotel. Johnson told them that the Trojan Company did not like the arrangement previously discussed but would go along on the payment of 3 cents per foot on the pipe taken out of the ground (R. 224-225). When Bianchi told Johnson that the payments must be in cash, Johnson replied that he had no way of getting that amount of cash out of Trojan Company, but that payments could be handled by invoice. Johnson said he would leave the arrangements to Bianchi. When Bianchi said he would have to have the money all at once, Johnson replied that Trojan was not able to make the lump sum payments but would have to spread them out over a period of time while the project was in progress. Bianchi then told Johnson that the Trojan Company could start work at once. Petitioner Thomp-

son, who was present, nodded his head in agreement (R. 225).

The Trojan Construction Company resumed work on the pipe reclaiming project on August 11, 1950 (R. 225). Thereafter, Trojan paid one Al Fishel $11,250 for the rental of equipment which it did not use (R. 225, 335-336). It was understood between Fishel and petitioners Poster and Bianchi that rental payments from Trojan were to be applied on the purchase of this equipment and machinery at a price of $15,550 (R. 335-336). After arrangements were made by Bianchi and Poster to pay Fishel the balance due (R. 338-342), title to the equipment was taken by the Washington Equipment and Construction Company of which petitioners were shareholders (R. 310-315).

Around November 1, 1951, Felix Johnson, representing Trojan, had a pre-job conference with petitioners Bianchi and Thompson concerning construction of the two loop lines for the Phillips Company. Bianchi referred to the pipe reclaiming project and said that the Phillips project could be started off right. Johnson explained that Trojan had lost money on the previous job and that, due to the likelihood of inclement weather, time was of the essence in performing the Phillips contract. Bianchi told Johnson that Trojan could get started right away on this project, that there would be no labor trouble, and that it would cost $1,000 in cash for each labor craft involved (R. 227). When Johnson advised Bianchi that Trojan could not pay cash but could honor an invoice, Bianchi said

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he could take care of the teamsters and laborers and operating engineers by invoice, but that the other labor craft, the welders, would have to have cash. (R. 226-227.)

On or about November 15, 1951, Johnson paid Bianchi $1,000 in the form of ten $100 bills (S.R. 17). By check dated December 14, 1951, for $3,062.50, Trojan paid the Washington Equipment and Construction Company for rental of equipment (S.R. 33; Gov. Ex. 4), which it had never received or used (R. 350, 351, S.R. 32). Petitioners Thompson and Poster subsequently liquidated their holdings in the Washington corporation (R. 316; Gov. Exs. 37-38, S.R. 78-85).

Felix Johnson testified that the payments were made because the officials of Trojan were fearful of economic loss, injury to Trojan employees, and damage to Trojan equipment. (S.R. 37.) The vice president of Trojan testified that the company's decision to pay petitioners was due to fear of possible financial loss and for the purpose of avoiding damage to company equipment and injury to company employees. (S.R. 60.)

ARGUMENT

This case is a classic example of extortion by union officials from an employer. Petitioners, far from using their power for the employees they ostensibly represented, threatened labor strife as the alternative to the exactions they demanded and received. As the jury and the courts below found, there was no semblance of a "labor dispute" in the record. At no time did the government's case in-

volve the validity of the union demands or the agreement between Trojan and the national unions. The payments to petitioners were made, not as a settlement of a union claim, but as tribute exacted. This is clear extortion under the statutory definition and as that term is commonly used.

1. Section (b)(2) of the Hobbs Act (*supra*, p. 3) defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Petitioners contend (Pet. 19-29) that the fear of economic loss occasioned by the threat of a prolonged labor shut-down is insufficient to make out a case of extortion under the statute unless accompanied by actual or threatened force or violence, even though the threat of a shut-down is used by a union representative merely as a means of personal enrichment. They argue that since they were not shown to have used actual or threatened violence in this case, there can be no Hobbs Act violation.

As the court below held (Pet. 52-57), there is no reason to construe the statute so narrowly, contrary to the plain meaning of the language used. If "fear" were used in the definition only in the sense of force and violence, there would have been no need to include this term in the definition of extortion, particularly since the statute refers to actual *or* threatened force and violence. To limit the term "fear" to that engendered by force and violence would drain the term of any independent

meaning. The word "fear" must therefore mean something different from fear of physical force and violence. That extortion may be predicated on compulsion other than physical force and violence is manifest from the definition itself, which provides that "color of official right" may serve as the compelling force. No showing of force and violence is required where the compulsion of official right is used. *Ladner* v. *United States,* 168 F. 2d 771 (C.A. 5). Since fear of economic injury can be as compelling as violence or color of office, there is no reason why the compulsion of such fear should not be sufficient to constitute extortion.

Such an interpretation of the word "fear" would not, as petitioners contend, make every interstate business or labor dispute subject to the Hobbs Act. The statutory definition relates to the "wrongful" use of fear. The threat to carry on activities, such as a strike, for a legitimate labor objective, even though it might involve the playing on fears of economic loss, would not be a "wrongful" use of fear, and would therefore not constitute an offense under the statute.[1] Moreover, the use of fear must

[1] A different problem is presented where the means used, such as force and violence, are themselves unlawful, even though the end sought may not be. That issue, which will be before this Court on a direct appeal by the government from a decision of the District Court for the Southern District of Illinois, *United States* v. *Green* (D.C. No. 5236, decided January 24, 1955), is not involved here since the purpose of petitioners' actions, to obtain money for themselves, is admittedly unlawful. Acknowledging the differences between the instant case and others under the Hobbs Act (Pet. 41), petitioners in effect recognize the fact that the *Green* appeal has no bearing on this case.

be to "extort", i.e., to obtain money or property, a factor which is not always present in such cases. The decisive point is that where, as here, the use of fear of economic injury is for a purpose clearly wrongful—the personal enrichment of labor representatives—there is a clear use of power to extort, and therefore a clear violation of the Hobbs Act.

Petitioners admit (Pet. 22-23) that, under the predecessor statute, the Anti-Racketeering Act of 1934,[2] which, *inter alia*, punished obstruction of interstate commerce through use of "force, violence or coercion", the use of fear of economic injury through threats of a labor shut-down by labor leaders for purposes of personal gain constituted coercion within the statute. *United States* v. *Compagna*, 146 F. 2d 524 (C.A. 2), certiorari denied, 324 U.S. 867; *Nick* v. *United States*, 122 F. 2d 660 (C.A. 8), certiorari denied, 314 U.S. 687. They argue, however, that the elimination of the word "coercion" from the Hobbs Act was designed to eliminate use of fear of economic coercion from the coverage of that statute. Neither the language nor the legislative history of the Hobbs Act supports this conclusion.

The 1934 Act had punished anyone who, in a matter affecting interstate commerce,

> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force,

---

[2] Act of June 18, 1934, 48 Stat. 979, 18 U.S.C. [1940 ed.] 420a-420e.

> violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or
>
> (b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right * * *.

The Hobbs Act punishes anyone who obstructs commerce by robbery and extortion, and then defines robbery and extortion. In the amended statute, the prime purpose of which was to overcome the decision in *United States* v. *Local 807,* 315 U.S. 521,[3] Congress adopted an arrangement of the statute different from that of the predecessor, and numerous changes of phraseology occurred. But there is nothing to indicate that the changes in phraseology were designed to eliminate the use of fear of economic injury for personal gain as an act condemned by the statute. To the contrary, the

---

[3] H. Rep. No. 238, 79th Cong., 1st sess., p. 10. In view of this primary purpose, it was natural that in debates, reference was made to the use of force, as had occurred in the *Local 807* case. Also, in view of the proposed elimination of the previous exemption granted to attempts to obtain "payment of wages," the proposed bill and its possible effects on labor disputes was of concern to labor leaders. But there is nothing to show any effort to obtain reversal of the *Nick* and *Compagna* holdings that payments to union representatives for personal enrichment was not payment of wages or to overturn the assumption of those cases that use of fear of economic loss constituted coercion.

legislative history clearly shows that the changes in phraseology were designed to make the statute conform to the standard definitions of the New York Penal Code, which had been followed by many states. Thus, Congressman Robsion of Kentucky stated, 91 Cong. Rec. 11906:

> The definitions of robbery and extortion set out in this bill are the same definitions set out in the New York State code of laws and are defined in substantially the same way by the laws of every State in the Union. Of course, it does not apply to any case where personal property of another person is taken lawfully, without force or violence or fear of injury.

See also 91 Cong. Rec. 11843, 11900, 11908, 11910. Before adoption of these definitions in the Hobbs Act, the courts of New York which had had occasion to construe the New York extortion statute had consistently ruled that the use of fear of economic injury to induce another to turn over money or property for the personal use of the one demanding it constituted extortion. *People* v. *Wilzig*, 4 N.Y. Crim. 403 (1886); *People* v. *Barondess*, 133 N.Y. 649 (1892); *People* v. *Hughes*, 137 N.Y. 29 (1893); *People* v. *Weinseimer*, 117 App. Div. 603 (1907), affirmed, 190 N.Y. 537 (1907); *People* v. *Warden of City Prison*, 145 App. Div. 861 (1911), affirmed, 206 N.Y. 632 (1912); *People* v. *Rosenzweig*, 265 N.Y. 323 (1934); *People* v. *Lamm*, 292 N.Y. 224 (1944), and *People* v. *Bernoff*, 292 N.Y. 230 (1944). Though each of the above cases was

surrounded by an atmosphere of labor discord, the courts readily separated extortion from the bona fide labor demands asserted by union officials and held that force and violence need not be shown to make out extortion in violation of the statute. The Hobbs Act, which adopted the New York definitions, should be construed in the same way. To require a showing of violence and force in order to prove extortion under the Hobbs Act would deny to interstate commerce the protection the Act affords. The use of power by labor union officials to enforce demands for personal tribute impairs the free movement of commerce as seriously as does the use of violence.

2. Section 302 of the Labor Management Relations Act (Taft-Hartley), 61 Stat. 136, 29 U.S.C. 186, provides in part:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

Although the indictment in this case was laid under the Hobbs Act, petitioners requested the trial judge to instruct the jury on the elements

of the offense described in the Taft-Hartley Act, to explain the difference between bribery and extortion, and to charge that the jury could find petitioners guilty under the Taft-Hartley Act as a lesser offense included in the offense charged (R. 539-549). The judge did not give such instructions. He did, after summarizing the government's theory of the case (R. 513-514), summarize the defense theory that petitioners were legitimately negotiating a labor controversy (R. 514) and did charge that there was nothing in such a controversy over working conditions that violated the law on which the indictment was based (R. 515). In describing the elements of the offense charged in the indictment, the judge told the jury that they must find, *inter alia,* that petitioners "made express or implied threats * * * that industrial strife would ensue" unless their demands for money were complied with, and that they "made such demands for money for their own personal profit and not in the interests of the members of their respective unions" (R. 521). He further charged (R. 526):

> The mere receipt of money or anything of value by a labor representative of employees from the employer of such employees is not of itself sufficient to constitute an offense under the indictment; but before you can convict any defendant under this indictment it is incumbent upon the Government not only to prove beyond a reasonable doubt that each defendant received or agreed to receive from Felix John-

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> son money or other things of value, but they must go further and prove beyond a reasonable doubt that the defendants committed some acts, the likely effect of which would be to induce fear in Felix Johnson, and if the Government fails to prove fear, the defendants should be acquitted.

In the light of this charge, and the evidence in this case, there is no substance in petitioner's contention (Pet. 29-34) that it was error for the judge to fail to charge on the elements of the Taft-Hartley Act and to permit conviction thereon as a lesser included offense. As petitioners themselves state, the Taft-Hartley offense relates essentially to bribery, and bribery and extortion are mutually exclusive. If the employer paid the money as a bribe, petitioners could not have extorted it through fear. *People* v. *Feld*, 262 App. Div. (N.Y.) 909 (1941); *cf. Hornstein* v. *Paramount Pictures, Inc.*, 292 N.Y. 468 (1944). Petitioners did not, as did the defendant in the *Feld* case (*supra*), offer evidence to the effect that they had taken money as a bribe. There was thus no reason for the judge to charge on a defense not made. The judge did charge in the portion quoted above that the mere receipt of money by a labor leader did not constitute the offense charged in the indictment. He also charged that, before petitioners could be found guilty, the jury had to find that they made threats for the purpose of extorting money for themselves. This charge related to the acts of the petitioners, not the state of mind of the employers, so that peti-

tioners are in error in saying (Pet. 33) that the difference in the offenses can turn on the timidity of the victims. As the judge correctly charged, petitioners were guilty under the Hobbs Act only if they themselves used fear to extort. Since the judge correctly charged on all the elements necessary to convict, he was not required to charge on the elements of some other offense not charged and therefore not before the jury for consideration.

Because of the totally different theories underlying bribery and extortion, violations of Section 302 are not lesser offenses included within violations of the Hobbs Act. Before an offense can be viewed as an included offense under Rule 31(c), F.R. Crim. P., it must necessarily be committed in the perpetration of the larger crime. The test is whether an acquittal on the one will bar a subsequent prosecution on the other. In this case, since the elements of the offense are different, an acquittal of extortion under the Hobbs Act, because of failure to prove that petitioners obtained money from their victims by unlawful use of fear, would not bar a subsequent prosecution for violation of Section 302. An offense completely inconsistent with the offense charged cannot be a lesser included offense.

3. Petitioners also contend (Pet. 34-37) that the trial judge erred in permitting representatives of Trojan to testify that they paid the money because of fear, not only of economic loss, but of injury to person and property, and in not withdrawing the issue of physical violence from the jury. As we

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have shown in point 2, however, the jury were told that in order to convict they must find that the defendants made threats which were intended to cause fear in the minds of Trojan, so that the jury could not have based the conviction merely on the mental state of the employer. And, as the court below points out (Pet. 65), the emphasis throughout the charge was on the fear of economic loss occasioned by the threat of a prolonged labor dispute (*e.g.*, "fear that work on the project would not go forward" (R. 514); "that the work would not otherwise proceed" (R. 516); "threats * * * that industrial strife would ensue" (R. 521); fear that "their project could not proceed and they would be delayed by labor trouble instigated and directed by the defendants" (R. 521-522).

While, as the judge charged, it is the acts of the defendants in causing fear, and not the state of mind of the victim, which is controlling on the issue of guilt under the Hobbs Act (see *United States* v. *Local 807*, 315 U.S. 521), it does not follow that evidence as to the victim's state of mind is irrelevant. In showing that a defendant intended by his threats to cause fear, it is relevant evidence to show that the threats did cause fear. The courts have so held. *United States* v. *Compagna*, 146 F. 2d 524 (C.A. 2), certiorari denied, 324 U.S. 867; *Nick* v. *United States*, 122 F. 2d 660, 671 (C.A. 8), certiorari denied, 314 U.S. 687; *Greater New York Live Poultry C. of C.* v. *United States*, 47 F. 2d 156, 159 (C.A. 2). There was no error in the admission of such evidence.

4. Section 6 of the Norris-LaGuardia Act [4] provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Petitioners' insistence (Pet. 37-38) that the trial court erred in refusing to give their requested instruction No. 14 (R. 538-539) dealing with the foregoing statute reflects only a mistaken attempt to convert this criminal prosecution into a labor dispute. Contrary to the assumption on which this argument rests (Pet. 38), petitioners were not held responsible for any illegal shutdown, nor were they, in the language of the Norris-LaGuardia Act, "held responsible * * * for the unlawful acts of" persons other than themselves. They were charged and convicted for their own threats of injury through unlawful use of their own power for the purpose of extorting money for themselves. In these circumstances, the purpose of the Norris-LaGuardia Act to restrict vicarious liability in labor disputes can have no bearing. There is here no problem of "imputation of guilt for lawless

[4] Act of March 23, 1932, 47 Stat. 71, 29 U.S.C. 106.

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acts done in labor disputes" (*United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 403), but only an accomplished scheme of extortion having no real connection with any labor dispute at all.

It is clear from a reading of the Norris-LaGuardia Act that proof that a person "actually participated" in a lawless act will be sufficient to hold him to account for the acts. In this case all three petitioners actually participated in the extortion charged. Acting in their own interest, they made their demands on the Trojan Construction Company. They made the threats, they collected the money, and they divided it among themselves. The evidence is equally clear that each participated in a conspiracy to violate the Hobbs Act, and that they conspired together as individuals intent on "feathering their own nest"[5] and not as representatives of labor unions furthering the interests of the union members.

5. Each petitioner filed three separate motions under Rule 21(a), F. R. Crim. P., asking for a transfer of his case to another judicial district for trial, and each filed three motions for continuance (R. 30-40, 43-45). In all these motions they claimed that local prejudice had resulted from a report of the Grand Jury and the United States Attorney's office concerning the pending racketeering investigations, released at the time the in-

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[5] Cf. *United States* v. *Compagna*, 146 F. 2d 524, 527 (C.A. 2), certiorari denied, 324 U. S. 867.

dictments were returned on July 23, 1953 (R. 30, 31, 36), from the charges of Judge Moore to the Grand Jurors in November 1953 (R. 33), and from the many newspaper and radio comments directed against racketeering in the area (R. 30, 31, 32, 33, 34). The denial of such motions is now asserted to be prejudicial error (Pet. 39-41).

Neither the court's charges to the grand jurors nor the grand jury reports made any mention of petitioners by name. The news items on the radio and in the newspapers were routine in nature and did no more than report the affairs of the courts. The report of the grand jury was made on July 23, 1953, whereas the trial of petitioners did not commence until February 15, 1954, six and a half months later.

The selection of jurors on the voir dire establishes that petitioners' apprehensions of prejudice were unjustified. The court carefully questioned the jurors regarding any knowledge they might have gained of the case out of court (R. 173-175). Petitioners submitted, and the court asked, additional questions (R. 193), including questions relative to the grand jury report and newspaper accounts (R. 197-198). The record discloses no restriction on petitioners' right to have the jurors examined, nor any refusal of a challenge. The record does not show any information relative to any juror from which could be inferred any concealed prejudice against petitioners.

Rule 21(a), F. R. Crim. P., provides for the transfer of a case to another district or division

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"if the court is satisfied that there exists * * * so great a prejudice against the defendant that he cannot obtain a fair and impartial trial * * *." It clearly lies within the discretion of the trial court to grant or deny motions for change of venue or for indefinite continuance. Until it is shown that the trial court acted arbitrarily or capriciously, its appraisal of the facts and circumstances in determining the best interests of justice should not be disturbed.

Petitioners argue that widespread publicity of itself affords them a basis for seeking a change of venue or obtaining a continuance. Such a rule would make impossible any trial of considerable public interest. *Holt* v. *United States,* 218 U.S. 245. The mere showing that publicity had been given to the matter of racketeering investigations does not of itself warrant a reversal of petitioners' conviction because their motions for continuances were denied. *Allen* v. *United States,* 4 F. 2d 688 (C.A. 7), certiorari denied, 267 U.S. 597; *Shushan* v. *United States,* 117 F. 2d 110 (C.A. 5), certiorari denied, 313 U.S. 574; *Paschen* v. *United States,* 70 F. 2d 491 (C.A. 7). Even newspaper publicity tending to incite public prejudice is not usually considered a sufficient reason for granting a continuance. *Finnegan* v. *United States,* 204 F. 2d 105 (C.A. 8), certiorari denied, 346 U.S. 821; *Shockley* v. *United States,* 166 F. 2d 704 (C.A. 9), certiorari denied, 334 U.S. 850. There were in this case no circumstances which would justify the conclusion that petitioners could not and did not have a fair trial.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 646.

CARL BIANCHI, L. A. THOMPSON
and WILLIAM POSTER,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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IN THE

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UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that this Court grant rehearing of its order of April 25, 1955, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above-entitled case as prayed for in the petition filed March 9, 1955, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. Subsequent to the Court's order denying certiorari, the United States, on April 28, 1955, docketed its appeal and filed its statement as to jurisdiction in **United States**

v. Green, No. 754, this Term, where the following question is presented:

> "Whether the obstruction of interstate commerce or the attempt to do so by the wrongful use of actual and threatened force, violence and fear, in an attempt to compel an employer to pay wages for imposed, unwanted, superfluous and fictitious services of laborers in a violation of 18 U. S. C. 1951."

The trial court there arrested a judgment of conviction finding that it had no jurisdiction of the offense charged and that "a proper construction of the Anti-Racketeering Act clearly indicates that it does not cover the type of activity charged in the indictment, and to interpret the act in question as covering the type of activity charged in the indictment is to extend the jurisdiction of the Court, and the power of Congress beyond their constitutional limits." The **Green** case thus involves the use of illegal means for a lawful purpose while the instant case involves the use of legal means, a strike, for the benefit of labor representatives. Both cases, however, involve not only an interpretation of "wrongful" as used in the extortion definition, but a construction of § 1951 (c), which provides:

> "This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45."

This Court, in the event that it notes probable jurisdiction in the **Green** case, will decide whether or not that conviction under the facts would repeal, modify or affect the Labor-Management Relations Act, sections 151-166 of Title 29. The construction of § 1951 (c) will be important in determining the issues here raised. Consideration should be given the issues in the instant case in the light of the **Green** case presently pending before this Court.

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2. On April 11, 1955, the Court of Appeals for the Ninth Circuit announced its decision in **Bloch v. United States** reversing a tax evasion conviction where the Court instructed the jury on the question of intent, and stated, in part, that the presumption is that a person intends the natural consequences of his acts. (A copy of the opinion of the Court of Appeals for the Ninth Circuit is appended hereto.) The Ninth Circuit followed the decision in the Fifth Circuit in **Wardlaw v. United States,** 203 F. 2d 884. The offenses of tax evasion and extortion both require a specific intent. Therefore, these decisions conflict with a question in the instant case not previously submitted to this Court in the petition for a writ of certiorari. The question is:

Whether or not an instruction that a person is presumed to intend the natural and reasonable consequences of his own acts is proper in a criminal prosecution involving a specific intent.

The trial court in the instant case instructed on intent as follows (R. 523-524):

> "What I now desire to call your attention to is that it is necessary, before you find the defendants, or either of them, guilty, as charged under Count 1, that you find the defendants became parties to the conspiracy charged intentionally and with the knowledge of the purposes of such conspiracy and for the purpose of furthering its aims and objects. When I say intentionally and knowingly I mean that they became such parties with bad purposes, without justifiable excuse. I say to you that the defendants must be shown to have had grounds for believing and did believe the purposes of the conspiracy were unlawful and that the purposes of the conspiracy would affect interstate commerce as charged in the first count of indictment * * *.

"Let me say a further word about intent. Intent is an invisible resolve of the human mind. Intent ordinarily must be gathered from one's actions. You can not look into a person's mind and tell what his intent is. There must be proof of facts upon which to hang the inference of specific criminal intent further than the proof of the act itself. It is not sufficient, with reference to the establishment of an intent and a purpose, that your conclusion be based upon conjecture or speculation. It is sufficient to a finding of intent to affect interstate commerce, or intent to commit or bring out any such result, if the unlawful conspiracy or the substantive act as charged in count 2 be established beyond a reasonable doubt and then that you find that the natural, ordinary, and reasonable result of the accomplishment of the conspiracy or the substantive act would be the substantial and direct interference with interstate commerce or the movement of articles or commodities in such commerce. Intent can not be shown frequently except by facts and circumstances, intent being what it is, the state of a person's mind. **And a person is presumed to intend the natural and reasonable consequences of his own acts.**"

The court below held that such an instruction was proper saying that it had approved similar language in other cases and that this instruction was only part of the instruction on intent quoting part of the above intent instruction (Pet. 64-65). The instruction on intent as a whole does not render harmless the error in instructing on presumptive intent. The instruction in the **Block** case was also just part of the entire instruction on intent. The fact that the employer's representatives testified that they feared economic loss does not mean that there is a presumption that when a labor leader requests money from an employer he intends to put the employer in fear. Under

the evidence, a jury could have found that the defendants intended to solicit a bribe and did not intend to put the employer's representatives in fear. Certainly the jury should not have been told in effect that from the testimony of the employer's representatives that they feared economic loss, it could be presumed that defendants intended such results.

This Court recently in **Morissette v. United States,** 342 U. S. 246, held that a specific intent is required in all larceny type crimes. In view of that decision and to aid in establishing uniform justice between the various courts of appeals, this court should grant certiorari on this issue.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....
Morris A. Shenker,

.....
Sidney M. Glazer,
Counsel for Petitioners.

APPENDIX.

Conflicting Opinion.

UNITED STATES COURT OF APPEALS
For the Ninth Circuit.

No. 14,266.

Bernard Bloch,	Appellant,	Appeal from the United States District Court for the District of Arizona.
v.		
United States of America,	Appellee.	

April 11, 1955.

Wade Church, Phoenix, Ariz., for appellant. Jack D. H. Hays, United States Attorney, Robert C. Murless, Assistant United States Attorney, Phoenix, Ariz., for appellee.

Before Bone and Pope, Circuit Judges, and Murray, District Judge.

Murray, District Judge: Appellant was charged in the District of Arizona in two counts with attempting to evade or defeat the payment of income taxes owing by him for the years 1947 and 1948, in violation of Section 145 (b),

Title 26, U. S. C. A.[1] After trial by a jury in the District Court, appellant was acquitted on Count One (1947 taxes) and convicted on Count Two (1948 taxes). He appeals, assigning three specifications of error.

The first specification of error relied on is that the District Court erred in failing to give appellant's requested Instruction No. 2.[2] There is no merit in this specification of error as such. In the first place, the instruction as requested is at least misleading and confusing, if not clearly erroneous. Counsel for appellant attempted to take the instruction from the case of **Gaunt v. United States**, 184 Fed. (2d) 284, 291, but omitted a portion of the last sentence of the instruction on wilfulness approved in the **Gaunt** case, supra. In the **Gaunt** case the last sentence of the instruction read:

> "He certainly is not wilful if he acts without advice of a lawyer or accountant, for there is no requirement

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[1] Sec. 145 (b). Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

[2] The indictment in this case charges a violation of a willful attempt to evade or defeat a tax imposed by Section 145 (b) of Title 26, United States Code. I instruct you that willfully "means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud or do wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent or grossly negligent. A defendant is not willfully evading a tax if he is careless about keeping his books. He is not willfully evading a tax if all that is shown is that he made errors of law. He is not willfully evading a tax if all that is shown is that he in good faith acted contrary to regulations laid down by the Bureau of Internal Revenue and the United States Department of Treasury. He certainly is not willful if he acts without advice of a lawyer or accountant."

> that a taxpayer, no matter how large his income, should engage a lawyer or an accountant."

Even that language, it seems to us, may be misleading because it might be subject to the interpretation that acting without advice of a lawyer or accountant shows a complete absence of wilfulness, and such is not the law. What was meant to be said is that merely acting without advice of a lawyer or accountant does not itself prove wilfulness. But by omitting the explanation "for there is no requirement that the taxpayer engage a lawyer or accountant," which was contained in the **Gaunt** case, from the requested instruction in this case, the instruction became completely unacceptable, and it was not error for the trial Court to refuse it.

Furthermore, the trial Court is not obliged to give an instruction in the exact language in which it is proposed, but may choose his own language. **Wright et al. v. U. S.**, 175 Fed. (2d) 384; **Nye & Nissen v. U. S.**, 168 Fed. (2d) 846, affirmed 336 U. S. 613; **Thayer v. U. S.**, 168 Fed. (2d) 247; **Petro v. U. S.**, 210 Fed. (2d) 49. As the Court said in **Wright et al. v. U. S.**, supra:

> "Fortunately, a trial judge, in formulating his charge, is entitled to use his own language and is not required to let counsel for either party put words into his mouth. If the charge is accurate and gives to the jury all of the law which it needs in order to reach a verdict, that is enough."

However, in examining the Court's charge to determine whether the jury was otherwise properly instructed as to the meaning of the word "willfully" as used in Section 145 (b), Title 26, U. S. C. A., it becomes apparent that the charge was incorrect in several aspects, which will be hereinafter discussed.

The appellant made no objection to the charge as given by the Court, but only objected to the failure of the Court

to give his requested instruction, nor did appellant raise in this Court any question regarding the correctness of the trial Court's charge on wilfulness. Whether the objection to the failure to give the offered instruction on wilfulness in the trial Court, and the specification of that failure as error in this Court would be a sufficient saving of the point to permit this Court to consider other nonspecified errors in the charge on wilfulness within the rule that Appellate Courts will not consider instructions to which no objections were taken at the time of trial need not be decided because of the provisions of Rule 52 (b) of the Federal Rules of Criminal Procedure and cases decided thereunder. Rule 52 (b) provides:

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The Supreme Court of the United States in **U. S. v. Atkinson**, 297 U. S. 157, concerning this matter, said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

See also **Morris v. United States**, 156 Fed. (2d) 525; **U. S. v. Balodimas**, 177 Fed. (2d) 485; **U. S. v. Perplies**, 165 Fed. (2d) 874; **Fischer v. U. S.**, 212 Fed. (2d) 441, 444.

The error of the trial court is, as we hereinafter point out, fundamental and goes to the very essence of the case so we must under the rule take notice of it.

Proceeding then to a consideration of the Court's charge we find the trial Court instructed the jury in part as follows:

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> "The attempt must be wilful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant."

That is a correct statement of the law, because the intent involved in the offense with which appellant here was charged is a specific intent involving the bad purpose and evil motive to evade or defeat the payment of his income tax. **Wardlaw v. U. S.**, 203 Fed. (2d) 884. However, the trial Court went on in his instruction, and in the very next sentence said:

> "The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax."

This is not a correct statement of law with regard to a criminal offense wherein specific intent is an essential element. **Morissette v. U. S.**, 342 U. S. 246, 273; **Wardlaw v. U. S.**, supra. As the Supreme Court said in the **Morissette** case, supra, at page 275:

> "We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the

crime. Such incriminating presumptions are not to be improvised by the judiciary. Even congressional power to facilitate convictions by substituting presumptions for proof is not without limit."

The conclusion sought to be supplied by presumption in the **Morissette** case was one of intent to steal casings, based upon the mere fact the defendant took them. What was said in that case applies equally to the case at bar where under the above portion of the trial Court's charge the jury was told in effect that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return.

The trial Court further instructed the jury as follows:

"Wilfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. **It includes several states of mind, any one of which may be the willfulness to make up the crime.**

"**Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act.**" (Emphasis supplied.)

We think that the emphasized portion of the above instruction is erroneous in this case.

This portion of the Court's charge apparently was taken from the language of the Supreme Court in **U. S. v. Murdock,** 290 U. S. 389. The **Murdock** case was one in which defendant was indicted for refusal to give testimony and supply information as to deductions claimed in his tax returns for moneys paid to others in violation of Section 1114 (a) of the Revenue Act of 1926 and Section 146 (a) of

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the Revenue Act of 1928 which sections were identical. Those sections provided that:

> "any person * * * required by law or regulations * * * to supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to * * * supply such information * * * shall * * * be guilty of a misdemeanor * * *."

When the Supreme Court there used the language which is embodied in the quoted portion of the trial Court's charge in this case, it was talking about how the word "wilfully" is variously defined under different statutes and circumstances. It is significant that in that case the Supreme Court, addressing itself to the particular case before it, said:

> "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent which the statute makes an element of the offense."

The **Murdock** case itself does not apply the definition of "wilfully" used by the trial Court in the instant Section 145 (b) case.

In this Section 145 (b) tax evasion case there is only one state of mind that will supply the intent necessary to sustain a conviction, and that is the intent to defeat or evade the payment of the tax due. Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the payment of the income tax that is due. Nor would filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do constitute in themselves the intent which is required under the section.

See **Hargrove v. U. S.**, 67 Fed. (2d) 820, 823, wherein the Court discussed and distinguished the element of intent necessary under different statutes. See also **U. S. v. Martell**, 199 Fed. (2d) 670.

These errors in the instruction are plain and affect substantial rights of the defendant and the fairness of the trial and require a reversal of the case.

Appellant's second specification of error is that the Court erred in failing to properly instruct the jury with reference to certain questions asked by the prosecution. Appellant was asked questions as to whether he had ever sworn that he had not had sexual relations with named women, whether he had ever taken oath that he had not performed illegal operations, whether he had been refused a doctor's license and whether he had kept a mistress. Objections to these questions were made and properly sustained by the Judge who in this regard did everything requested of him by counsel for the defendant. The Judge would no doubt have given a more specific and detailed instruction advising the jury to disregard those questions and the implications arising therefrom had he been so requested.

Whether the instructions the Court did give in this connection were sufficient to protect the defendant need not now be decided inasmuch as the case must be reversed for the reasons already stated.

It is, however, appropriate to express our disapproval of the tactics employed by the government attorney in the prosecution of this case. The government on appeal sought to justify these prejudicial questions on the ground that the appellant had put his character in issue when he testified he was a member of the Junior Chamber of Commerce and that he had opened a skating rink to help deal with the problem of juvenile delinquency. We cannot agree that this testimony put appellant's character in issue. Further-

more, some of the questions concerning the appellant keeping a mistress were asked of witnesses before appellant ever took the stand.

The appellant was on trial on the charge of attempting to evade or defeat the payment of his income tax. His guilt or innocence of that charge was the only issue in the case and the questions asked, above referred to, were not relevant in any way to that issue and could only serve to paint the appellant as a scoundrel in the eyes of the jury. The practice of attempting to convict a defendant not of the crime of which he is charged, but rather of being an all round, no good dissolute person, is foreign to our system and is disapproved by this Court.

Appellant's third specification of error is that the jury brought in conflicting verdicts on counts one and two. There is no merit in this specification.

The cause is reversed and remanded for a new trial on Count two of the indictment.